

DEC 16 1957

JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 29

THE UNITED STATES,

Petitioner,

vs.

CENTRAL EUREKA MINING COMPANY (a corporation), ALASKA-
PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND
MINES CORPORATION,* HOMESTAKE MINING COMPANY, BALD
MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS

APPENDICES A, B, C AND D

December 16, 1957.

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APPENDIX A

The Background, Purpose, Provisions and Effects of Order L-208.

Appendix A to the petitioner's brief, which is entitled "History and Background of Limitation Order L-208", purports to deal with the background and origin of the Order, its purpose and its effects.

In this Appendix we will treat with the background, purpose, provisions and effects of the Order in the following sequence:

I. The background and origin of the Order (p. 2-33). This will cover largely the same ground as pages 73-104 of the petitioner's Appendix A and also a number of things which are not mentioned by the petitioner.

II. The purpose of the Order (p. 34-39). This will review Finding 46 of the Court of Claims and the support therefor.

III. The provisions of Order L-208 (p. 40-45).

IV. The inadaptability of the Order to serve as a priorities or allocation order relating to critical materials (p. 45-68). This will consider both (1) the reasons why the Order was not adapted to serve as a priorities or allocation order relating to critical materials and (2) the Findings and evidence that it did not function as such. Among other things, it will cover the same ground as pages 104-107 of the petitioner's Appendix A.

V. The practical failure of the Order to serve the purpose for which it was issued: the transfer of a substantial number of hardrock miners to the nonferrous metal mines (p. 68-92). This will review (1) the Court's Findings and the evidence as to the reasons why the Order could not be expected to accomplish its purpose and (2) the Findings and evidence that it was a practical failure.

Preliminary.

The terminology of Order L-208, of the amendments thereof (petitioner's brief, p. 111-125) and of the peti-

tioner's brief may be somewhat confusing. Order L-208 refers in various places to "critical materials"; "any material, facility or equipment"; "machinery and equipment"; "any material or equipment"; "material"; and "materials". The amendment of November 19, 1942 repeated all of these as they were used in Order L-208, and also had a provision relating to "machinery or equipment". The terminology of the amendment of August 31, 1943 followed that of the amendment of November 19, 1942.

As we read the Order and the amendments (see below, p. 40-45):

The words "critical materials" or "materials" did not include "machinery or equipment".

"Machinery and equipment" were embraced by the words "facility or equipment".

Those are the senses in which the words are used herein.

I

The background and origin of Order L-208

The opening section of the petitioner's Appendix A (p. 73-79) deals with the War Production Board, its creation, powers and procedures.

With the petitioner's description of the War Production Board and its "P", "M" and "L" Orders (p. 75-79), we have little fault to find until we reach the last paragraph (p. 78-79), which lists "L" Orders limiting the production

¹ Executive Order 9024 gave authority to "the Chairman of the War Production Board, with the advice and assistance of the members of the Board" (Appendix D, p. 8). Technically, therefore, Order L-208 was the action of the Chairman of the WPB. However, the issuance of the Order was "agreed" upon at the WPB meeting of October 6, 1942 (Findings 41, 42; R. 100-102) and it would not seem to make any practical difference whether the Order is looked upon as an act of the Chairman or as an act of the Board. The petitioner's brief treats the Order throughout as the act of the Board and does not mention the provision of Executive Order 9024 which we have quoted.

of various end products manufactured with critical materials and then at the end of the list puts Order L-208 as if it were the same kind of order (p. 78-79).

By thus trying to link Order L-208 with "L" Orders relating to such end products, the petitioner attempts to support the assertion in the brief that "L-208 is but one of approximately 350 similar L orders and one of thousands of L, M, P and other type orders issued by the WPB and the OPM (Office of Production Management) during the course of the war, resulting in severe financial losses to innumerable businesses" (p. 40). This sentence is to be found in part of an argument that allowance of compensation for losses of the type imposed by Order L-208 "would impose an incalculable and staggering financial burden on the nation" (p. 42).

There is no similarity between Order L-208 and the "L" orders referred to in the petitioner's Appendix A at pages 78-79. The latter were directed against the production of end products which necessarily required the use of critical materials and such "L" orders were true regulations of the use of critical materials. None of them contained a directive such as that in Order L-208 that "each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine" (Finding 43, R. 102).

Moreover, the "L" orders to which the petitioner refers were actually intended to conserve critical materials. Their prohibitory provisions were designed to accomplish that objective. As the Court of Claims found, Order L-208 was not intended to conserve critical materials; its purpose was to shut down the gold mines (see below, p. 34-39).

The Reports of the Judiciary Committees of the House and the Senate said later:²

² See pages 40-42 of the main body of this brief.

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"No similar order was issued against any other segment of American industry".

Finding 3 of the Court of Claims contains the following paragraphs (R. 63; see also R. 32-33):

"The 'L' orders were usually issued to prohibit or curtail the manufacture of end products containing critical materials, continued production of which would have necessarily consumed such critical materials. Sometimes an additional purpose of such 'L' orders was to accomplish the conversion of scarce manufacturing facilities to war production.

"'L' orders were issued prohibiting or limiting the production of end products such as office machinery, furniture, bicycles, stoves, refrigerators, laundry equipment, automobiles, and other products. In most instances a prohibition against the production of a product resulted in the facilities being transferred to war production. Thus, the automobile industry's facilities were largely converted to war purposes although some of the facilities may have become inoperative because of a lack of adaptability to other purposes or to war production."

While referring (p. 78) to the page of the record at which these paragraphs of Finding 3 appear, the petitioner's brief in no way suggests that there was a Finding of Fact on this subject and particularly fails to mention that, as the Court of Claims found, "in most instances a prohibition against the production of a product resulted in the facilities being transferred to war production".

Nor, of course, does the petitioner acknowledge the difference between the purpose of the L orders mentioned in Finding 3 and Order L-208: that the former were intended to conserve critical materials, and that the latter was not issued for that purpose at all but rather to shut

down the gold mines so as to "maneuver our manpower" to the nonferrous metal mines (see below, p. 31).

The "L" orders mentioned in Finding 3 are discussed at pages 28-29 in the main body of this brief.

The continuation of the policy of avoiding unnecessary dislocations in the civilian economy.

Appendix A to the petitioner's brief might be thought to imply that the Government's policies during the War were hostile to nonessential industries generally. That was not at all the case.

Finding 10, which refers to the issuance on December 18, 1941 of Preference Rating Order P-100, says in part (R. 72-73):

"The stated purpose of Order P-100 was to effectuate the policy of SPAB³ in maintaining governmental, charitable and industrial property located in the United States, its territories and possession, upon an adequate operating basis, without expansion or improvement of facilities except where duly authorized or approved. Industries coming within the terms of Order P-100 were entitled to an A-10 Preference Rating (the lowest rating used) for their maintenance, repair and operating supplies.

"P-100 represented a continuation of SPAB's policy of granting some preference rating for maintenance, repair and operating supplies to industries in general without regard to essentiality in the war program, and this policy prevailed throughout the war. This policy was designed to avoid unnecessary dislocations in the civilian economy."

³ The Supply, Priorities and Allocations Board, whose functions and powers were later transferred to the WPB (R. 62).

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The progressively more stringent priority regulations between July, 1941, and March, 1942, which eliminated the potential acquisition by the gold mines of critical materials, supplies and equipment.

The first order by a Government agency cited in the Findings (Finding 5, R. 65) and mentioned in the petitioner's Appendix A (p. 79) is Preference Rating Order P-23, which was issued on July 29, 1941.

There are twelve subsequent Findings relating to priority regulations that affected the gold mines (R. 65-75). They end with the second paragraph of Finding 17, which reads (R. 74-75):

"The gold mines excluded by the above amendments to Order P-56 were reduced to the same priority position as that of the least essential industries in the United States, i.e., they were entitled only to an A-10 preference rating for the acquisition of maintenance, repair and operating supplies under Order P-100. They were excluded from obtaining any critical materials which might have been needed by any of the nonferrous metal mines or by any other industry deemed by WPB to be more essential. While it was possible for gold mines excluded from any benefits under P-56 to apply for equipment under the general repair order P-100, the demand for desired equipment was so far above available supply that the possibility of the gold mines obtaining any was remote. Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment."

The petitioner's Appendix A devotes almost twelve pages to the period between July 29, 1941 and March 2,

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1942 (p. 79-90) and ends by repeating almost verbatim the sentences which we have just quoted (p. 89-90).

The situation which existed on March 2, 1942 continued unaltered:⁴ the potential acquisition by the gold mines of critical materials, supplies and equipment had been virtually eliminated. The Court of Claims found that when the WPB issued Order L-208 it knew that such was the case. Finding 50 reads in part (R. 106-107):

*"50. On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew (1) that existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users; * * *"*

We do not know why counsel for the petitioner elected to devote twelve pages of the petitioner's Appendix A to the details of the steps by which the potential acquisition of critical materials and equipment by the gold mines was eliminated unless it was thought that the presentation of this mass of subordinate detail would lend credit to more important and more vulnerable sections of the Appendix.

However, we observe one important feature of the narrative in the petitioner's Appendix A (p. 79-91) and the summary thereof in the petitioner's Statement (p. 5-8). An attempt is made to create the impression that from January, 1942 until the issuance of Order L-208 in October, 1942 there was a continuity of the purpose or purposes of the WPB in connection with the gold mines. That attempt is particularly evident at page 91, where it is distinctly implied that in the spring and summer of 1942 the

⁴ In May, 1942, there was an amendment of one of the priority orders, which is referred to in Finding 17 (R. 74) and in the petitioner's brief (p. 90-91), but, as the petitioner says, it "effected no practical change".

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manpower problem and the priorities problem operated together to produce the shut-down of the "nonessential" gold mines. That is not at all true.⁵

What actually happened can be readily ascertained by reading the Findings of Fact covering the period from July 29, 1941 through March 2, 1942 (Findings 5-17; R. 65-75) and then reading the Findings that follow.

By March 2, 1942 the critical materials problem was solved, so far as the gold mines were concerned. In July 1942 a new and distinct problem emerged, involving the shortage of miners in the copper and other nonferrous metal mines.

In the petition for certiorari, the petitioner informed the Court (p. 4-5):

⁵ It is logical to divide the story of the background and origin of L-208 at the point where the objectives of the progressively more stringent priority regulations had been accomplished—March 2, 1942, the date given in Finding 17 (R. 74-75). That is the division which the petitioner made in the petition for certiorari (p. 3-7).

A new part of the story commences in July 1942, when it was first suggested that production of gold "should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort" (Finding 19, R. 76; Petitioner's Appendix A, p. 92).

The petitioner's Appendix A has a heading "*Regulations Adversely Affecting the Gold Mining Industry Prior to Limitation Order L-208*" (p. 79) under which the petitioner deals with the period between May 1941 and December 18, 1941. The Appendix then has a new heading, "*The Evolution of Limitation Order L-208*", under which the Appendix purports to tell a consecutive story running from January 1942 to the time when Order L-208 was issued and thereafter (p. 86-110). Under the heading "*The Evolution of Limitation Order L-208*", there are six pages which deal with the successful efforts to eliminate the potential acquisition by the gold mines of critical materials, supplies and equipment that culminated in March 1942 (p. 86-91).

Thus the petitioner abandoned a logical division of its narrative, which it had made in the petition for certiorari, and attempted to create the erroneous impression that there was a continuity of the purpose or purposes of the WPB, with relation to the gold mines, from January, 1942 until L-208 was issued on October 8, 1942.

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"Thus, by granting the lowest possible priority rating in a market where supplies were exceedingly scarce, the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies."

Before leaving the period during which the priorities problem was solved, so far as the gold mines were concerned, and proceeding to a review of the later period during which the WPB was persuaded to shut down the gold mines in order to bring about a transfer of underground hardrock miners to the copper and other non-ferrous metal mines, we should mention some of the documents quoted in the petitioner's Appendix A at pages 82-87.

At page 82 the petitioner quotes from a memorandum submitted on November 18, 1941 to the SPAB by Mr. Donald Nelson, who was Chairman of the WPB when Order L-208 was issued (Finding 8, R. 66). The most important sentences in the quotation, relating to the consumption of critical materials by the gold mines, are these:

"It is to be emphasized that from a consumption of scarce materials standpoint, this whole issue is a minor one. Only about \$7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political."

This comment by Mr. Nelson was made on November 18, 1941, several months before the progressively more stringent priority regulations had virtually eliminated the potential acquisition of critical materials, supplies and equipment by the gold mines. His characterization of the issue as "a minor one" before it was solved should be contrasted with the repeated suggestions in the petitioner's

brief that seven months after the issue had been solved it remained of major importance.*

The period from July, 1942, through October, 1942.

The period from July, 1942, when the Labor Division of the War Production Board, officials of the War Department and the War Manpower Commission were all becom-

* Our other comments are less important.

At page 85, the petitioner's Appendix A quotes from a memorandum of the Chairman of the Board of Governors of the Federal Reserve System, dated December 16, 1941, in which the Chairman said (Finding 9, R. 70):

"Since new gold output is largely unnecessary and diverts materials, machinery, and labor from production of war supplies, I strongly favor curtailing it so far as is practicable through the priorities system. I would suggest that no machinery be allowed to foreign mines for the expansion of gold output; and that machinery and supplies for the maintenance and repair of gold mines should be restricted, to the minimum consonant with the principles adopted by the Supply Priorities and Allocation Board for other nondefense industries."

It will be noted that the Chairman made two suggestions: (1) "that no machinery be allowed to foreign mines for the expansion of gold output" and (2) that materials and supplies for the maintenance and repair of domestic gold mines should be further restricted. His suggestion with respect to foreign gold mines was not followed; throughout the War "critical materials, machinery and equipment subject to allocation and control by the WPB were shipped in substantial quantities to foreign countries for use in their gold mining industry" (Finding 49, R. 106). On the other hand, further restrictions on the domestic mines were applied and "insured that the gold mines would not receive any critical materials needed by more essential users" (Finding 50, R. 107).

At pages 86-87 the petitioner quotes from a letter to the Chairman of the War Production Board written on January 20, 1942 by Wilbur Nelson, Administrator of the Mining Branch of the WPB. Mr. Nelson's letter said that he was speaking "particularly with reference to foreign mines outside of North and South America (e.g., South Africa)" (R. 1178). That portion of the letter is omitted by the petitioner.

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ing concerned about the shortage of miners in the non-ferrous metal mines, until shortly after Order L-208 was issued on October 8, 1942, is covered by Findings 18-52 (R. 75-111) and may well be subdivided into two parts.

In the Findings relating to the period from the beginning of July through September 15, 1942, there are some mentions of the conservation or allocation of critical materials, although those Findings leave no doubt that the manpower purpose of the proposed closing of the gold mines was so dominant even at that time as virtually to exclude anything else (Findings 18-31, R. 75-95). *In the voluminous Findings covering the events during the period between September 17 and October 10, 1942, both inclusive, which set forth the significant documents of that period, including the minutes of the WPB meeting at which the issuance of L-208 was agreed upon (Findings 32-45, 52; R. 96-105, 107-111), there is no reference whatever to the conservation or allocation of critical materials except in the wording of Order L-208 (Finding 43, R. 102-105).*

**July, 1942 through
September 15, 1942**

Findings 18-31, covering the period from the beginning of July, 1942 through September 15, 1942 are quite voluminous (R. 75-95). Some portions of them are particularly pertinent on the question as to the effectiveness of Order L-208 as a manpower measure and especially relevant in considering the assertions in the petitioner's brief that the WPB acted "on the basis of repeated and careful studies" (p. 16, 25). At this juncture, however, we will discuss Findings 18-31 primarily in connection with the issue as to the purpose of Order L-208.

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On July 8, 1942 a War Department Committee recommended to the WPB that (Finding 19, R. 76):

"2. Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort."

This recommendation was the first specific proposal of a curtailment of the operation of the gold mines to "free labor which is urgently needed in the nonferrous mines".

On July 4, 1942 the Priorities Branch of the Labor Production Division of the WPB had sent a memorandum to the Director of Operations of the War Manpower Commission which concluded as follows (Finding 20, R. 76-78):

"Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover."

The plan to camouflage a gold mine closing order as a War Production Board regulation of critical materials apparently had its beginning in a memorandum sent on

¹ The petitioner's brief summarizes (p. 93) statements made in this memorandum about the number of employees of the "15 largest producers of gold in seven Western states". We refer later (p. 72-73) to what the Court of Claims found as to these statements.

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July 9, 1942 by the General Counsel of the War Manpower Commission to a member of his staff (Finding 21, R. 78; petitioner's brief, p. 94) :

"At a meeting of the War Manpower Commission yesterday, the following problem was referred to this office.

"General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; (2) may the Chairman of the War Manpower Commission direct the War Production Board to take that action?

"The specific situation suggested is simply illustrative of the general problem in this field."

Finding 22 starts with the following (R. 78) :

"The proposal for closing the gold mines in order to divert their miners to nonferrous metal mines was gaining momentum in August 1942."

The petitioner's brief says merely (p. 94): "By August 1942, the proposed curtailment of nonessential gold mines was gaining momentum". The brief does not mention that there is a Finding and the words "*in order to divert their miners to nonferrous metal mines*" are simply omitted.

Finding 23 starts with the following (R. 79) :

"Late in August 1942, Guy N. Bjorge, General Manager of plaintiff Homestake Mining Company, the largest gold-mining company in the United States, learned that consideration was being given by the Government to a *proposal to close domestic gold mines in order to divert their miners to the non-ferrous metal mines.*"

The Finding then tells of the trip made by Mr. Bjorge to Washington for conferences with the WPB.

The petitioner's brief says (p. 94-95):

"Later in August, the General Manager of the Homestake Mining Company conferred with several officials of the WPB and expressed his opposition to the closing of the mines, basically for the same reason as that given by Wilbur Nelson."

Thus the petitioner makes no reference to the fact that Mr. Bjorge had learned that consideration was being given by the Government to "a proposal to close domestic gold mines in order to divert their miners to the nonferrous metal mines."

Finding 24, more than a page long, covers a significant correspondence between Senator McCarran of Nevada and Donald Nelson, Chairman of the WPB (R. 80-81). The Finding states that on August 26 Senator McCarran wrote Chairman Nelson "setting forth various reasons why he believed the proposed closing of the gold mines would not accomplish its purpose of obtaining any considerable number of miners for the nonferrous metal mines" and the Finding cites some of the reasons which the Senator gave. The Finding also quotes part of Chairman Nelson's answer of September 1, which accepted Senator McCarran's assumption that the purpose of the proposed closing of the gold mines was to obtain miners for the nonferrous metal mines, and, among other things, said (R. 81):

"We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today."

All that the petitioner's Appendix A says on this subject is that Senator McCarran "in a letter to Donald Nelson set forth his reasons why the curtailment of gold mining,

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operations would not be effective for the purpose of obtaining any considerable number of miners for the nonferrous mines" (p. 95).

On September 1, 1942 the War Production Board had a meeting covered by Finding 25 (R. 81-84). This Finding contains extensive quotations from the minutes of the meeting. The petitioner's brief incorporates major portions of the quotations which are in the Finding (p. 95-98). However, if the Finding (R. 81-84) and the petitioner's quotations (p. 95-98) are laid side by side, it will be found that the petitioner has omitted four paragraphs which are in the Finding. We do not contend that the petitioner's omission of these four paragraphs has resulted in a distorted picture of what took place at the WPB meeting of September 1, but the picture is incomplete without them.*

On September 4, 1942 a direction was given that an order shutting down the gold mines be drafted by the Miscellaneous Minerals Branch of the WPB (Finding 26, R. 84-85).

Finding 27 covers a long memorandum sent on September 9, 1942, by R. J. Lund, Chief of the Miscellaneous Minerals Branch of the WPB, to the Deputy Director General for Industry Operations of the WPB when transmitting to him a draft of the shutdown order. This memorandum takes up more than five pages of the record (R. 85-90). The treatment of the memorandum in the petitioner's Appendix is astounding.

* The first omitted paragraph set forth the purpose of the meeting, which was to hear a report of the Labor Production Division and the Copper Branch "on the Manpower problem in the nonferrous metals industries" (R. 81). The next two omitted paragraphs gave reasons for the shortage of miners in the nonferrous metal mines (R. 82); they afford support for Findings 47 and 50 (R. 106, 107). The fourth omitted paragraph included a statement by the Chairman of the WPB that the WPB "must take an active and leading role in assuring an adequate supply of copper" (R. 83-84).

The second paragraph of the memorandum says (R. 85):

"It was understood that the purpose of the order was to make mining labor now producing gold available to copper and other strategic nonferrous metal mines. This end can be attained by WPB only through its authority to control materials."

This simple and explicit statement of the purpose of L-208 is not referred to anywhere in the petitioner's brief.

The petitioner's Appendix makes a few generalizations about the contents of the Memorandum and then quotes a 9-line paragraph under the heading "Critical materials saved" (p. 98, R. 87). The impression is created that the quoted paragraph was one of the most important parts, if not the most important part, of the memorandum. That is emphatically not true.

When the Chief of the Miscellaneous Minerals Branch prepared the memorandum, he undertook to treat therein with eight subjects (followed by a "Concluding Statement"), the discussion of which takes up almost five pages of the record. "Critical materials saved" constituted subject (6).

It will be immediately apparent that, by omitting the paragraph in the memorandum which set forth the purpose of the proposed closing of the gold mines and emphasizing the 9-line mention of critical materials, the petitioner has presented a distorted picture.* Indeed, that is so apparent that further mention of Mr. Lund's memorandum of September 9, 1942 would hardly seem worthwhile were it not the fact that in all of Findings 18-42 (in which the con-

* The seventh subject was "Effect on economy of states and communities" (see the main body of this brief, p. 53, 93-94). There is four times as much in the memorandum about the adverse effect of a shutdown of the gold mines on communities and states as there is about critical materials, but the petitioner's brief does not mention the former.

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temporary documents are set forth), covering the period between the beginning of July, 1942 and the decision on October 6, 1942 to close the gold mines, there are only three suggestions that the shutdown of the gold mines might be even incidentally effective to conserve critical materials and one of the three is the quoted paragraph of the memorandum of September 9, 1942. So we will examine that paragraph to see whether it could reasonably have influenced the thinking in the WPB when it was issued on September 9.

It reads (R. 87):

"Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available but the general order of magnitude of such consumption is indicated by the fact that in 1939 gold mines in the United States (excluding Alaska) spent about \$17,000,000 on supplies and materials, \$2,000,000 for fuel and about \$5,000,000 for purchased electric energy."

The paragraph completely disregards the fact that six months before "progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment" (Finding 17, R. 75).

Even if there had been no effective priorities regulations, the expenditure by gold mines of \$17,000,000 on "supplies and materials" in 1939 would have been no indication of the amount of critical materials which the gold mines surviving in October 1942 would acquire or use if they were not shut down. The term "supplies and materials" includes all kinds of supplies and materials, whether critical or not. By the fall of 1942 gold mining had already declined drastically under the pressure of manpower shortages and materials restrictions and 1939 statistics were long out of date

(Appendix C to Plaintiff's Exhibit 1, R. 149, 1163, 1244A). Many mines producing gold would not be shut down as "nonessential," as they produced substantial amounts of critical materials. In the case of the mines which were closed down, "supplies and materials" would have to be consumed to keep the mines from flooding and in other permitted maintenance operations.

It is not reasonable to suppose that this casual paragraph in the long memorandum of September 9, 1942, influenced the thinking of the WPB.

The next document referred to in the petitioner's Appendix A (p. 98-99) is a memorandum which an assistant to the Deputy Director General for Industry Operations sent to the Chairman of the WPB on September 11, 1942 with "a copy of the proposed curtailment order on gold" (Finding 28, R. 90-91). The draft order is Defendant's Exhibit 46 (R. 962, 1594-1597). It differs vitally from Order L-208 as finally issued; among other things, it did not contain the key paragraph of Order L-208 (Finding 43, R. 102):

"(1) On and after the issuance date of this order, each operator of a nonessential [gold] mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine."

Attached to the memorandum which accompanied the draft order was a draft of an SEC-4, from which the petitioner quotes (R. 1595). The SEC-4 form was used for brief explanations of WPB orders (see e.g. Plaintiff's Exhibit 74, R. 383, 1438A; Defendant's Exhibit 2, R. 1574A-1574B; Defendant's Exhibit 3, R. 479, 1574C-1574D, 1575). The petitioner's brief quotes a paragraph from the draft SEC-4 which accompanied the draft order of September 11, 1942 and refers to the draft SEC-4 as if it were a finalized document (p. 98-99). It was not. It was simply a draft prepared by an assistant to the Deputy Director General for

Industry Operations and it was not used. A draft statement prepared by an assistant on September 11, which was rejected, certainly has little significance in considering the purpose of an order which was issued on October 8. Interestingly enough, Order L-208 itself was not accompanied by any "brief summary of action recommended", called for by the SEC-4, except this: "That attached order be issued by the Director General for Operations". No explanation was given. This appears from Defendant's Exhibit 2 (R. 1574A-1574B).

Finding 29 (R. 91-92) quotes from a memorandum which was presumably written about September 11, 1942, although it is not known when it was written or who wrote it. While the petitioner's brief does not quote this memorandum in full, its quotation of an excerpt is a fair one (p. 99).

The first sentence of the petitioner's quotation reads:

"The basic purpose of this curtailment of gold mining is; of course, to free manpower for the mining of essential minerals, particularly nonferrous metals such as copper, zinc and lead."

The last sentence is this:

"Besides diverting manpower to essential industries, this order, when in effect, will also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc."

For whatever it may be worth, it thus appears that whoever wrote the memorandum knew, at the time when it was written that "the basic purpose" of the proposed curtailment of gold mining was what the Court of Claims later found was the only real purpose (see p. 34-39 below), "to free manpower for essential mining", but the writer thought that the shutdown of the mines "would also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc."

Finding 30 sets forth that on September 15, 1942 there was a meeting of the Inter-Departmental Committee on Non-Ferrous Metals and the Finding contains rather full quotations from the minutes of that meeting (R. 93-94). This meeting and Finding are not mentioned by the petitioner at all.

It would unduly lengthen this appendix to quote Finding 30 in full, but we will quote three consecutive paragraphs:

"Mr. Harbison [Army representative] expressed some concern over the delay in issuing the gold order. He outlined the steps that various agencies had taken to meet the manpower shortage in nonferrous metal mines, and pointed out that the transfer of gold miners to essential mining was being held up by the lack of a gold curtailment order. He pointed out that the U. S. Employment Service had been unable to obtain many¹⁰ recruits at Rapid City, South Dakota, because the gold mines had not been closed down, although Anaconda Copper Mining Company had agreed to pay transportation costs. He made it clear that the War Department was impatient at the delay.

"Mr. Lester of the War Manpower Commission asked that his organization be kept informed of what mines would be affected by the directive, in order that representatives of the Employment Service might be on the spot beforehand,

"In this connection, since the primary purpose of the order was to free manpower rather than to curtail materials, Mr. Lipkowitz suggested that an advisory committee be established with representatives from Labor Production Division and War Manpower Commission."

This meeting of September 15 was the first occasion mentioned in a Finding when the Army (through the Services of Supply) or the War Department, engaged in what

¹⁰ The Finding reads "obtained any" (R. 93). That is a typographical error; the Exhibit contains the wording given above, "obtain many" (Plaintiff's Exhibit 82; R. 1456).

the petitioner calls "urging" (p. 21, 55) and the Court of Claims called "pressure" (R. 18). There were later occasions, more significant and more dramatic, on October 2, October 5 and October 6, which are mentioned below.

Finding 31 relates to a memorandum submitted to Chairman Nelson of the WPB by Mr. Morris Creditor, Special Assistant to the Chairman on September 15, 1942 (R. 94-95; Plaintiff's Exhibit 21, R. 400, 1313-1314). This memorandum raised a number of pregnant questions. The petitioner's Appendix A does not mention it at all. It is worth quoting in full:

"I have reviewed the proposed limitation order for the gold mining industry and I wish to raise certain points as to the soundness of such an order.

"You will recall that we received a letter from Senator Gurney on August 31 in which he set forth the harmful effects that such an order would have on the economy of the State of South Dakota. In your reply you stated in effect that we were confronted with the manpower problem and something had to be done to overcome the losses of production which are being experienced in the mining of copper and other strategic materials through the shortage of experienced miners.

"In the preamble of the limitation order no mention is made of manpower requirements. It simply states that the order is made necessary because of the shortage in the supply of critical materials which are used in the maintenance and operations of gold mines.

"It would seem to me that if the order is based on the premise of critical materials alone, the question might be raised as to why such an order would not apply to materials being sent by this country to other gold mines in Canada, South America, and South Africa.

"If the main purpose of this order is to divert miners from the gold mining industry to copper and

other mining industries, it seems to me that there is no assurance that this order would accomplish the desired results. As Gustav Peck pointed out to you in his memorandum of September 9, it would be too bad to close the Homestake Mine, for instance, without the assurance that most of the miners will continue to practice their trades in the copper mine.

"Would it not be more practical to accomplish the purposes by a freeze order similar to that which is now in effect for workers in the copper mines and the lumber industry. This may be more drastic but, on the other hand, may give better assurance that the miners in the gold mines would eventually find their way into the copper mines. Consideration might also be given to the idea of having the Army give indefinite furloughs to Service men who in the past were engaged in the mining of non-ferrous materials.

"Even aside from the possible dissipation of these skilled miners into other occupations, there is question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally, will be stuck in Alaska. Where are they expected to go?

"I am sure that a great deal of thought has been given to the proposed limitation order on gold mining, but unless there is a high degree of assurance that the main purpose will be accomplished; namely, the diversion of these miners to the non-ferrous mines, I feel it is important to weigh the adverse effects it might have in other directions.

"Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries."

**September 17, 1942
through
October 12, 1942**

The Findings covering the period from September 17, 1942 through October 6, 1942, the date of the WPB meeting when it was formally agreed to issue L-208, contain no reference whatever to priorities or the allocation of critical materials. On the other hand they contain pervasive and dominant references to mine labor, particularly hardrock miners (Findings 32-42, R. 96-102). Nor is there any reference to priorities or the allocation of critical materials in the Findings covering the period subsequent to October 6, 1942 except those relating to the wording of Order L-208 itself.

On September 17, 1942 a memorandum was issued, quoted in Finding 32 (R. 96), which related to the procedure to be followed in the clearance of the shutdown Order. The memorandum sheds no light on the purpose of the Order.

On September 25, 1942, representatives of the branches of the WPB which were concerned with mineral production passed a resolution urging that representatives of the gold mining companies be called to Washington to discuss the proposed gold order so that:

"A. Where possible, existing organizations may be utilized for important mining operations, or prospective operations, necessary in the war effort.

"B. Labor, and especially experienced miners, can be made available to the mining industry, rather than lost to vital metal production."

This meeting, covered by Finding 33 (R. 96), which is not mentioned in the petitioner's Appendix A, is important because it led to the meeting of October 1, 1942 at which

representatives of the gold mining industry met with WPB officials and others. The October 1 meeting is referred to in some detail later and we show that the petitioner's Appendix A makes only an extraordinarily brief and cryptic reference to it.

On September 25, 1942, Vice Chairman Batt of the WPB sent a memorandum to the Director General for Industry Operations of the WPB, two paragraphs of which are quoted in Finding 34 (R. 96). The second of those two paragraphs reads as follows:

"It seems to me imperative that we very carefully word our press release so that the predominant objective, namely of releasing less essential labor for more essential requirements, shall be clearly evident. And I particularly direct the attention of those who have to do with this matter at this point."

This significant statement by the Vice Chairman of the WPB is not mentioned anywhere by the petitioner.

On September 30, 1942 a conference was held at the office of Vice Chairman Batt of the WPB, covered by Finding 35 (R. 97). All that the petitioner says about this conference is that "Senators McCarran and Gurney and Representatives Case and Englebright . . . voiced the hardships that would be imposed on the inhabitants of gold mining communities and the detrimental effect on morale if the order were issued" (p. 100). The petitioner completely omits two significant sentences in Finding 35 (R. 97):

"The WPB representatives, except Wilbur Nelson, countered with statements emphasizing the need for labor in copper mines. Some discussion arose as to the number of gold mine employees who would be released by such a closing order."

Those sentences show, as does every Finding relating to the period from September 17 through October 12, that

everyone knew that the purpose of the proposed shut-down order was to release miners for the copper mines.

On October 1, 1942, a meeting was held in Washington (Finding 36, R. 97-98) which, as the petitioner says (p. 100), was "attended by WPB officials, representatives of the gold mining industry, the War Department, the War Manpower Commission and Senator Gurney and Representatives Case and Englebright." So far as appears, this was the only meeting at which the gold mining industry was afforded an opportunity to make any representations to the WPB about its proposed action. The meeting lasted "for approximately five hours" (R. 97). The Finding which relates to it takes up more than a full page of the record.

The outstanding feature of the long, detailed Finding relating to this five-hour meeting is that it indicates throughout that the purpose of the proposed order was to shut down the gold mines in the hope of transferring the "released labor to the copper mines".

After setting forth who called the meeting and who was there, the Finding says (R. 98):

"At the opening of the meeting Mr. Batt [the Vice Chairman of the WPB] stated that he had brought the gold mine operators to Washington to tell them that *a decision had been made to close the gold mines in order to transfer the released labor to the copper mines.*"

A vigorous controversy developed at the meeting as to (1) the number of hardrock miners and muckers¹¹ who would actually be released by a closing order, and (2) whether

¹¹ The references in the record to "hardrock miners", "hardrock miners and muckers" and "miners and muckers" all mean the same thing. They refer to underground miners in the gold mines, which are hardrock mines (see p. 70-71 below).

the released miners and muckers would go to the copper and other nonferrous metal mines. There was an open division within the WPB as to the possible effectiveness of the proposed order; several men in the WPB doubted that it would be effective (R. 98). On the other hand, the representative of the Army "spoke strongly in support of a closing order" (*id.*). Late in the meeting Dr. Wilbur A. Nelson, who was the Chief of the Mining Branch of the WPB (Finding 23, R. 79), "undertook to determine how many miners and muckers would actually be released by a closing order" (R. 98).

All that the petitioner's Appendix A says about this vastly important meeting is that: "Arguments for and against the order were advanced; and its possible effectiveness as a partial solution to the manpower problem was questioned" (p. 100). Certainly that is a pretty bald effort to slide over a most significant Finding, which is highly pertinent on the issue as to the purpose of Order L-208 and in addition is most relevant in connection with the petitioner's argument that the WPB acted "on the basis of repeated and careful studies" (p. 16, 25).

The study undertaken by Dr. Wilbur A. Nelson of the WPB on October 1 was the *first* as to the number of hard-rock miners and muckers who would be released by a closing order and it is to be contrasted with previous unsupported and usually ambiguous assertions (see below, p. 80-81). This *first study* was undertaken at the close of a meeting which the Vice Chairman of the WPB had opened by announcing that *a decision had already been made "to close the gold mines in order to transfer the released labor to the copper mines"* (R. 98).

On October 1 Mr. Batt, Vice Chairman of the WPB, sent a memorandum to Donald Nelson, the Chairman, saying:

"The more I study the gold mining situation, the more uncertain I am as to the form which a restriction of operations should take. *Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure.* If the question comes up in your press conference, I would suggest that you refer to the need for miners and the lack of need for gold, and say that the matter is being studied from all angles."

Mr. Batt's memorandum is covered by Finding No. 38 (R. 99): It is not mentioned by the petitioner anywhere.

On October 2 the Under Secretary of War sent Mr. Batt the following letter (Finding 39, R. 99):

"I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.

"If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's approval, and I believe that Mr. Forrestal will do the same for the Navy."

The next day, October 3, Dr. Wilbur Nelson reported to the Vice Chairman of the WPB that there were only 896 hardrock miners and muckers among the employees of the gold mining companies which would be affected by the proposed Order, and that since approximately 300 would be needed for maintenance if there were a shutdown, the closing of the mines "would make available *only about 600 miners and muckers for other mining enterprises 'pro-*

vided they [could] all be induced to go into other mines' "
(Finding 37, R. 98-99).¹²

This estimated maximum of 600 can be contrasted with the wildly inaccurate or inapplicable figures which had previously been advanced (see below, p. 80-81). Moreover, *there were many factors, known at the time to the WPB and set forth in Finding 50, which could be expected to keep all but a small percentage of the 600 from transferring to the nonferrous metal mines* (Finding 50, R. 106-107).

Nevertheless, the forces which led to the issuance of Order L-208 continued to gather momentum.

On October 5 the Under Secretaries of War and the Navy sent the following memorandum to the Chairman of the WPB (Finding 40, R. 99-100), which the petitioner quotes (p. 101):

"The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.

There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.

The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.

¹² The third line on R. 99 is a misprint; it repeats the twelfth line in Finding 35 (R. 97). The following should be substituted:

"order. His report concluded that if all the gold mines and"

The correct text of the Finding will be found at p. 83 of the Appendix to the petition for certiorari.

The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided."

As already noted, it had previously been determined that a shutdown of the gold mines "would make available only about 600 miners and muckers for other mining enterprises, 'provided they [could] all be induced to go into other mines'" (R. 99). At the trial, counsel for the Government made no effort to show the origin of the Under Secretaries' statement that there were "two thousand to three thousand hard-rock miners engaged in gold mining".

On October 6, 1942 a WPB meeting was held at which the formal decision to issue Order L-208 was reached (Finding 41, p. 100-101). Pertinent portions of the minutes of the meeting are set forth in the petitioner's Appendix A (p. 101-103). There are three significant things about the meeting:

First, there is no reference in the minutes to the acquisition or consumption by the gold mines of any critical materials or to any desire on the part of the WPB or the Army to requisition or allocate any critical materials, machinery or equipment already owned by the gold mines.

Second, the WPB apparently accepted Dr. Wilbur Nelson's figures that at that time there were only 896 hardrock miners and muckers in the gold mines which would be closed down and that approximately 300 of them would be needed for maintenance and other necessary work, so that only about 600 would be available if they could all be induced to go into other mines (Finding 37, R. 98-99; Finding 41, R. 100). There is no reference in the minutes to the very large difference between Dr. Nelson's figures and the figures given on October 5 by the two Under Secretaries.

Third, General Somervell, who was Commanding General of the Services of Supply of the War Department (R. 1466), made a statement for the Army (R. 101):

"General Somervell stated that because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, failure to stop gold production immediately would be inexcusable."

Later the WPB's own Policy Analysis and Records Branch Office said (Plaintiff's Exhibit 1, R. 149, 1163, 1218, *italics in the original*):

"General Somervell's position, however, amounted almost to an ultimatum, which permitted no alternatives."

The action agreed upon, as set forth in the minutes of the meeting, was that (R. 101):

"An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition."

Order L-208 was actually issued on October 8, 1942 (R. 102).

On October 7, 1942, even before Order L-208 was issued, Chairman McNutt of the War Manpower Commission issued a directive intended to channel any person who "ceased to be employed as a production or maintenance worker in connection with gold mining" into "work in essential nonferrous metal mining, milling, smelting, and refining activities" (Finding 44, R. 105). This Finding is not referred to in the petitioner's brief.

The petitioner's brief also omits mention of Finding 45 (R. 105), which relates to the issuance immediately after October 8, 1942 of a statement by the Chairman of the War Manpower Commission and the Chairman of the WPB "appealing to all workers in gold mines to transfer to non-

ferrous metal mines and not to other war industries". In this joint statement these officials were most explicit in their characterization of the objective of Order L-208. Among other things, they said (Plaintiff's Exhibit 34, R. 430, 1323):

"To meet our war production program with respect to these [non-ferrous] metals, it becomes necessary now to maneuver our manpower so that less essential mining can be diverted to vitally important operations. With this as our objective it has been determined that all gold mining shall be discontinued at the earliest possible moment."

On October 10, 1942, 21 United States Senators from 12 gold-producing Western States sent a long written detailed protest to the President (Finding 52, R. 107-111), in which it was stated that the making of the Order "is supported by the theory that the labor employed in these gold mines will go into mines of copper or lead or zinc" (R. 109). Seven paragraphs of the protest, taking up a full page of the record, were then devoted to an effort to convince the President that only a small number of hardrock gold miners could be expected to go into the copper, lead and zinc mines (*id.*). The protest concluded with the following paragraph (R. 110-111):

"We respectfully bring this matter to your attention with the request that you stay the order made by the War Production Board affecting the gold mine operations of the United States, at least until the whole subject of marshalling of manpower and the allocation of labor may be considered, and the vital questions involved, concluded; thus that the gold mining industry of the United States may not be subjected to unwarranted and unusual hardship and injury which may not eventually be considered necessary, and which may not be equitably borne by other industries."

The 21 Senators clearly understood that the purpose of Order L-208 was to channel miners and muckers into the nonferrous metal mines (R. 109).

The Government's brief recognizes that the President's rejection of the Senators' protest and request for a stay constituted an approval of the Order by the President (p. 21, 55).

There is additional documentary evidence which is not covered by Findings or referred to in the petitioner's brief:

On October 10, 1942, the Under Secretary of War sent the President of the Homestake Mining Company a telegram reading as follows (Plaintiff's Exhibit 132, R. 612-613, 1516):

"FACED WITH A SERIOUS SHORTAGE OF COPPER AND MOLYBDENUM FOR OUR ARMAMENT PROGRAM STOP THE WAR PRODUCTION BOARD HAS ORDERED THE CLOSING OF GOLD MINES TO PROVIDE ADDITIONAL TRAINED LABOR FOR THE NON FERROUS METAL MINES STOP THE SECRETARY OF WAR HAS ALSO TAKEN THE UNPRECEDENTED ACTION OF FURLOUGHING MINERS IN MILITARY SERVICE STOP I HAVE DIRECTED IMMEDIATE ACTION TO BRING OFFICIALS OF THE WAR DEPARTMENT AND OF THE ANACONDA COPPER MINING CO IN COOPERATION WITH YOUR LOCAL MANAGEMENT AT LEAD COMMA SODAK STOP I AM ASKING YOU TO TAKE THE LEADERSHIP IN EFFECTIVE (SIC) THE QUICKEST AND LEAST DISTURBING TRANSFER OF WORKERS FROM THE NATIONS GOLD MINES TO NON-FERROUS MINES STOP I WILL APPRECIATE PROMPT MEASURES ON YOUR PART TO INSURE FULL COOPERATION OF YOUR LOCAL MANAGEMENT AT LEAD STOP.

The Under Secretary's statement that the War Production Board had ordered "the closing of gold mines to provide additional trained labor for the nonferrous metal mines" was certainly the statement of one who knew why the WPB had acted. For, not only was the Under Secretary at the

WPB meeting at which Order L-208 was agreed upon (Plaintiff's Exhibit 92, R. 426, 1466), but, as the petitioner's brief says (p. 21, 55), the WPB had acted "at the urging of the War Department".

On October 11, 1942, General Somervell, who (with the Under Secretary of War) had represented the War Department at the October 6 meeting of the WPB (Plaintiff's Exhibit 92, R. 426, 1466), wrote to Senator Gurney a letter, in which the concluding paragraph read as follows (Plaintiff's Exhibit 127, R. 520, 1510-1511):

"In the light of the facts set forth above, I know that you will understand why the War Department feels that military necessity demands the immediate curtailment of the gold mines. *The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort.*"

The second sentence of this paragraph is a notably succinct statement of what happened. The gold mining industry was *singled out*. It was singled out for *one reason only*. That reason was that the War Department wanted *hardrock miners for the nonferrous metal mines*.

On October 12, 1942, the Chief of Staff of the Army wrote to Senator Gurney a letter in which he said, among other things (Plaintiff's Exhibit 128, R. 523, 1511-1512):

"It is my understanding that the War Production Board has ruled that the gold mining industry be closed down in the hopes that this action will release experienced mine labor for employment in the mining of the basic strategic materials essential to our war production program. I am sure that this action was taken only after careful consideration of all the factors involved."

II

The purpose of Order L-208

The most important issue considered by the Court of Claims was whether the real purpose of Order L-208 was to close down nonessential gold mines in order to effect a transfer of mine labor to the nonferrous metal mines, or whether the Order was intended to regulate the allocation and use of critical materials, machinery and equipment.

The Commissioner made a Finding consisting of three sentences. The respondents objected to the second and third sentences and they were rejected by the Court (R. 7-8, 105-106):¹³

“The dominant consideration by Chairman Donald Nelson¹⁴ of WPB in the issuance of Limitation Order L-208 was the releasing of mine labor from the gold mines for employment in mines that were producing other metals, such as copper, which were in short supply and urgently needed in the war program. [Another consideration in the issuance of the order was as stated in the preamble that the fulfillment of requirements for the defense of the United States had created a shortage in the supply of critical materials which had been used in the maintenance and operation of gold mines.]”

Both objectives were in some measure accomplished with the closing of the plaintiffs' gold mines pursuant to the order.]”

The sentences which the Court of Claims rejected are underlined in the quotation.

¹³ The Commissioner's Finding was numbered 44. The Court's Finding is numbered 46.

¹⁴ It will be recalled that Executive Order 9024 gave authority to the Chairman. See Note 1 above.

The Court of Claims thus expressly found that "The dominant consideration" was the releasing of mine labor and expressly rejected the Commissioner's view with respect to critical materials.

The word "dominant" is defined in Webster's International Dictionary (Second Ed.) as follows:

"1. Having the ruling or controlling influence; prevailing; predominant. * * *"

As we show below, there cannot be the slightest question that when the Court spoke of "The dominant consideration", and excluded any reference to any other consideration, it meant that the Order had only one real purpose, the releasing of mine labor.

The petitioner's brief concedes that "a dominant consideration underlying its issuance was the release and expected diversion of labor from the gold mines to non-ferrous metal mines" (p. 11). It says later that "the diversion of manpower to essential mines was a motivating factor in the issuance of L-208" (p. 60). These changes of the word "*the*" to the word "*a*" are hardly accidental. The petitioner has simply tried to reinstate the Commissioner's finding, without stating what the Court's Finding was or even indicating that the Court made a Finding as to the purpose of the Order.

There can be no doubt as to what the Court meant when it referred to "*The dominant consideration*". The Court said in its opinion (R. 19):

"The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders

had solved that problem in connection with the gold mines.

.

"The record establishes that the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i.e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines."

In denying the motion for a rehearing the Court restated its original holdings (R. 145):

"The court held that what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a 'priorities order' or an 'allocation order'."

If there were any question as to the meaning of the words "The dominant consideration" in the lower Court's Finding 46, this Court can resort to the lower Court's opinion to determine the meaning of the Finding.¹⁵

Although Judge LARAMORE dissented, he agreed with the majority as to the purpose of the Order. He said (R. 61):

"The majority opinion points out that L-208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort; i.e., those mines whose gold production in dollar value exceeded 30 percent of their total production."

¹⁵ See pages 64-65 in the main body of this brief.

Moreover, the petitioner itself agrees that the Court of Claims concluded "that L-208 was not devised for the purpose of conserving or allocating materials" (p. 53).

Nevertheless, the petitioner's argument is an attack on the Findings of Fact of the Court of Claims, although not stated to be such. If the petitioner has any right to challenge those Findings, which is doubtful for the reasons pointed out at pages 58-60 of the main body of this brief, it may challenge them only on the ground "that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue" (see the main body of this brief at p. 63-64).

The Findings of evidentiary or primary facts pertain largely to documentary evidence. The petitioner does not assert that any of the Findings, whether or not relating to documents, is not supported by substantial evidence. And it would be preposterous to assert that the Findings of evidentiary and primary facts do not sustain the Court's ultimate Finding, No. 46, as to the purpose of the Order.

Indeed, the record heretofore summarized in this Appendix, particularly the portions thereof pertaining to the period from September 17, 1942 to October 12, 1942, can lead to only one reasonable conclusion: that the purpose of the Order, which was issued at the instance of the Army and the War Department, was the purpose that was stated at the time by the Army and the War Department in the Under Secretary of War's telegram of October 10 and General Somervell's letter of October 11. They were the spokesmen for the War Department and the Army in the crucial memoranda which are quoted in Findings 39 and 40 (R. 99-100) and at the WPB meeting of October 6 where

General Somervell said that "failure to stop gold production immediately would be inexcusable" (Finding 41, R. 100-101).

No one can read the documentary record of the October days and have any question as to what happened (see above, p. 25-33). The Vice Chairman of the WPB began the month with serious misgivings about the proposed closing of the gold mines (Finding 38, R. 99). But a strong memorandum was sent to the Vice Chairman on October 2 by the Under Secretary of War (Finding 39, R. 99). It was followed by a still stronger one on October 5, signed by the two Under Secretaries (Finding 40, R. 99-100). Both the Under Secretary of War and the Commanding General of the Services of Supply of the Army were at the October 6 meeting, at which General Somervell said that "failure to stop gold production immediately would be inexcusable" (Findings 41, 42; R. 100-102). Following the issuance of Order L-208, there were the Under Secretary's telegram, General Somervell's letter and the letter of the Chief of Staff (see above, p. 32-33).

Moreover, immediately after the issuance of L-208 Chairman Nelson of the WPB himself announced that the objective of the Order was "to maneuver our manpower so that less essential mining can be diverted to vitally important operations" (see above, p. 30-31).

If there had been any real intent to have Order L-208 serve as a priorities or allocation order, the Government would surely have called as witnesses several of the many men who had to do with Order L-208 at the top level and who were still alive at the time of the hearing before the Commissioner. The only top level official called by the Government was General Somervell, and nothing he said tended to cast any doubt on the correctness of the Finding of the Court of Claims (Finding 46, R. 105-106). On the

contrary, his testimony affords additional support for the Finding.¹⁶

The Government's failure to call any of the other top level men speaks for itself.¹⁷

The one top level witness whom the Government did call, General Somervell, said nothing to impeach the shortest and best statement of the purpose of Order L-208, which had been made by him in his letter of October 12 (Plaintiff's Exhibit 127, R. 520, 1510-1511):

"The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort."

¹⁶ He testified on direct examination (R. 1134-1135):

"Q. General Somervell, do you recall at any time during the war having the question of gold mining come to your attention?

A. Yes, it was widely discussed at one stage of the game.

Q. Can you fix the approximate date when it came to your attention?

A. I think it was in 1942.

Q. Can you recall how it came to your attention?

A. No, I don't. The matter was widely discussed, as I said, with our staff, and most likely with the General Staff and with the WPB.

Q. What were the—in what connection did it come to your attention, the question of gold mining?

A. The shortage of miners needed for critical materials, particularly copper."

¹⁷ The Commissioner charged the Government with "breaking faith with the court", because it did not produce Vice Chairman Batt as a witness (R. 1144). Counsel for the Government considered the charge unwarranted (R. 1146) and we do not ask this Court to find that it was justified. We bring up the subject merely to point out that the matter of having as witnesses men who had to do with L-208 at the top level was raised at the hearing and that counsel for the Government called no one other than General Somervell.

III

The provisions of Order L-208.

On analysis, it will be found that

1. The key paragraph of Order L-208, paragraph (b)(1), which directed the shutdown of nonessential mines, was implemented by paragraphs (b)(2) and (b)(3), which prohibited the acquisition, consumption or use of *any* materials, facilities or equipment in specified mining activities.

2. No direction in the Order related to *critical* materials.

3. The preamble to the Order, which did speak of critical materials, was the conventional "L" order preamble.

4. The references in paragraphs (b)(2); (b)(3) and (c) to "material" were presumably intended to give superficial support to the impression, which the preamble was designed to create, that Order L-208 was a true regulation of critical materials.

The key paragraph of Order L-208 was paragraph (b)(1), which read (R. 102):

"On and after the issuance date of this order, each operator of a nonessential¹⁸ mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine."

It was implemented by paragraph (i), which provided (R. 104):

¹⁸ Order L-208 defined a "nonessential mine" as a mining enterprise, whether lode or placer, in which gold was produced, unless the operator held a serial number under Preference Rating Order P-56 (R. 102). After March 2, 1942, serial numbers were not granted to gold mines unless they produced substantial amounts of critical materials (Finding 17, R. 74).

“(i) *Violations.* Any person who willfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.”

No other “L” order contained a provision like the “close down” directive in paragraph (b)(1), which deprived the owners of the nonessential mines of the only beneficial use which could be made of them (R. 19).

Paragraph (b)(2) provided (R. 102):

“In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment *to break any new ore or to proceed with any development work or any new operations in or about such mine.*”

Thus paragraph (b)(2) implemented the broad directive in paragraph (b)(1) by putting a 7-day deadline on *any extension* of mining operations.

Paragraph (b)(3) provided (R. 102-103):

“In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment *to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine,* except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.”

Thus paragraph (b)(3) implemented the close down provision of (b)(1) by putting a 60-day deadline on the continuance of *all mining activities, other than necessary maintenance.*

The close down action "agreed" upon at the October 6 meeting of the WPB was set forth in the minutes as follows (R. 101):

"An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition."

Paragraph (b)(3) of L-208 was simply a more detailed statement of this.

Chief Judge JONES said that paragraphs (b)(2) and (b)(3) "forbade the use of *critical* materials in nonessential industry", that "they would have produced the closing down of the mines whether or not paragraph (b)(1) had been included" and that paragraph (b)(1) should "be construed as mere surplusage" (R. 58-59). That view reflects a misunderstanding of the Order and disregards its purpose.

In the light of the direction in paragraph (b)(1) that the affected gold mines "close down", nothing whatever was added to Order L-208 by the provisions in paragraphs (b)(2) and (b)(3) prohibiting the consumption, acquisition or use of "*any material, facility, or equipment*" *in the conduct of the operations of the mines* thus ordered to be closed down. The only significance of the provisions of paragraphs (b)(2) and (b)(3) lies in the 7-day and 60-day deadlines imposed by their terms on the mining activities therein specified which would have required the continued use of mine labor.

Paragraphs (b)(2) and (b)(3) did not relate to "*critical materials*" as Chief Judge JONES supposed. The refer-

ences therein were to "any material, facility, or equipment", whether needed in the war effort or not. The prohibitions of the acquisition, consumption or use of "any material, facility, or equipment" in any of the several mining activities mentioned in (b)(2) and (b)(3) were obviously adopted as a device to make L-208 superficially similar to an order relating to the acquisition, consumption and use of critical materials. The fact is that the Order contained no mention of critical materials except in the preamble.

Moreover, as we point out in more detail later (p. 50-52), paragraph (b)(3) shows that the provisions of the Order relating to the use of "any material, facility or equipment" contemplated that the owners of the nonessential mines would keep their materials, facilities and equipment for use when gold mining was resumed. The Court below said (R. 34):

"Any actual conservation intended and brought about by that part of L-208 which prohibited the use of the gold mine owners' equipment and machinery for the mining of gold was for the purpose of conserving that equipment and machinery for future use by the nonessential gold mines in the production of nonessential gold."

Judge LITTLETON's opinion for the Court below contains a realistic analysis of the Order, particularly paragraphs (b)(2) and (b)(3) (R. 44-45):

"The real substance and intent of the order was embodied in the prohibition directed at the continued operation of the gold mines. The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used

in the mining of gold, and was part and parcel of the express order to cease doing business."

Paragraph (c), which was not mentioned by Chief Judge JONES, related to the application of preference ratings "to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine" (R. 103). This provision of the Order was clearly surplusage since the gold mines had already been denied access to critical materials (Finding 17, R. 74-75; Finding 50, R. 106-107).

The preamble of the Order read (R. 102):

"The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and or export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

This was the conventional "L" order preamble¹⁹ and it tended to give L-208 the appearance of an "L" Order. It was camouflage, since the critical materials problem had been solved seven months before, so far as the gold mines were concerned, and the WPB knew that such was the case (Finding 17, R. 75; Finding 48, R. 106; Finding 50, R. 106-107; see above, p. 6-9; see below, p. 45-46).

The impression intended to be created by the preamble, that L-208 was a true regulation of critical materials, received superficial support from the references in paragraphs (b)(2), (b)(3) and (c) to "material". However, an analysis of those paragraphs would disclose that they

¹⁹ See, e.g., L-58, 7 F. R. 1856; L-64, 7 F. R. 2454; L-71, 7 F. R. 2392; L-79, 7 F. R. 2867; L-85, 7 F. R. 2722; L-116, 7 F. R. 3475; L-120, 7 F. R. 5119; L-136, 7 F. R. 4477; L-150, 7 F. R. 4482; L-157, 7 F. R. 5557.

did not relate to critical materials. Order L-208 was imperfectly camouflaged.

It will be recalled that on September 15, 1942, Mr. Morris Creditor, Special Assistant to the Chairman of the WPB, wrote to the Chairman about the preamble of a draft of the Order which was under discussion at the time (Finding 31, R. 94-95; see above, p. 21-22). That draft of the Order did not contain the "close down" direction which was in Order L-208 as issued, but the preamble of the draft order was identical with that of Order L-208 (Defendant's Exhibit 46; R. 962, 1594, 1595-1597). Mr. Creditor said (R. 95):

"Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries."

This straightforward recommendation was not adopted.

The Court below held that "what WPB said it was doing and what it in fact and law did, were two different things" and that the Government could not escape liability "simply by calling its action of taking a 'priorities order' or an 'allocation order'" (R. 145).

There can be no question that L-208 was camouflaged. The Government has offered no explanation of the reason for the camouflage, but instead has persevered in the attempt to make L-208 seem like a true "L" order, designed to conserve and allocate critical materials.

IV

The inadaptability of the Order to serve as a priorities or allocation order relating to critical materials, machinery or equipment.

There are only two ways in which a priorities or allocation order could serve any function: (1) to prohibit or

control the movement of critical materials, machinery or equipment *to* the gold mines—that is to say, to prohibit ~~or~~ control the acquisition of critical materials by the gold mines—or (2) to bring about the movement of critical materials, machinery or equipment *from* the gold mines.

The Court below analyzed Order L-208 on both these points.

**Acquisitions by
the gold mines.**

We have noted at pages 41-43 of this Appendix that paragraphs (b)(2) and (b)(3) related to the acquisition of “*any* material, facility, or equipment”; that paragraph (c) referred to the acquisition of “*any* material or equipment”; and that none of those paragraphs was intended to control use or allocation of *critical* materials. They merely implemented the “close down” directive in paragraph (b)(1).

If the paragraphs had referred to critical materials, they would have been surplusage, because the purpose of the Order was to shut down the gold mines to “maneuver our manpower” (R. 1323) and there was no need for any further restriction on the acquisition of critical materials by the gold mines (see above, p. 33-44).

The second paragraph of Finding No. 17 is decisive on this point (R. 74-75). We repeat the last sentence of that paragraph (R. 75):

“Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment.”

Finding 48 says further (R. 106):

"Although the preamble to the order stated that it was issued to conserve critical materials, supplies and equipment needed for defense and in short supply, the only part of the order itself which attempted to effect such a conservation was that part which prohibited the gold mines from acquiring such materials, and that acquisition had already been effectively curtailed and in large part cut off by existing priority orders (finding 17)."

Finally, Finding 50 starts with the following (R. 106-107):

"50. On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew (1) that existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users; • • •"

The Statement in the petitioner's brief (p. 7) gives a good part of Finding 17 without quoting or summarizing the last sentence which we have quoted above. However, the substance of that sentence is given, without reference to the Finding, in the petitioner's Appendix A (p. 90) and it must be safe to assume that the petitioner does not challenge the Finding. The petitioner does not refer to, much less challenge, the portions of Findings 48 and 50 which we have quoted.

Nevertheless, we find in the petitioner's Summary of the Argument a most extraordinary statement (p. 22):

"And L-208 prohibited the consumption of material, facilities, and equipment by nonessential mines. By these devices, demand upon manufacturers and suppliers of mining supplies was thereby reduced; demand was thus brought more nearly in line with supply and facilities, manpower and equipment were released for the production of products essential to the war effort. In these respects, L-208 was a typical exercise of the allocation authority of WPB."

And at page 59 the petitioner says:

"By its terms, L-208 prohibited the acquisition of new material essential to maintenance and operation. The demand for such material was thereby reduced, thus bringing demand more nearly in line with supply."

• • • • • Through the L orders the Board took direct action to cut down on the authorized demand for materials for the purpose of bringing that demand somewhere near the available supply of materials. And this was precisely what had to be done, for to make it possible for a system of materials allocation to work it was essential to lop off the excess demand for materials. This the Board did by banning the manufacture of nonessential products. • • • • •
Industrial Mobilization For War, op cit., page 309."

The argument that by Order L-208 "the demand upon manufacturers and suppliers of mining supplies was thereby reduced" and that "demand was thus brought more nearly in line with supply" is a sort of disassociated concept bearing no relation to the Findings or the facts. The potential demand for critical materials had already been eliminated. It accomplished nothing, so far as critical materials are concerned, to prohibit the acquisition of *any* material, whether needed in the war effort or not.

The ultimate is reached in the brief when the contention is made that "L-208 was a typical exercise of the allocation authority of the WPB" (see above, p. 2-5).

**Movement of critical materials,
machinery or equipment from
the gold mines.**

If the gold mines which were shut down by Order L-208 had had critical materials, machinery or equipment for which there was a real need, the logical step for the Gov-

ernment would have been to requisition them. That would have insured their movement to the places where they were needed.

The Government did not requisition materials, machinery or equipment from the gold mines, either at the time when Order L-208 was issued or later. The petitioner's brief emphasizes this when it argues that there was no taking (p. 20).

As to the respondent Homestake Mining Company, the Court found²⁰ (Finding 65, R. 114):

"At no time did WPB requisition or order Homestake to surrender or transfer any of its supplies, equipment or machinery, nor did it make any inquiries regarding the amount, nature or availability of Homestake's supplies, equipment and machinery, although the Board was furnished with an inventory of supplies on hand and other information relating to equipment and machinery."

As to the terms of the order, Finding 48 includes the following (R. 106):

"That part of the order which prohibited the use by the gold mines of the supplies, materials and equipment and facilities they owned and had on hand did nothing to assure that those materials, etc., would be available for use by more essential industries or by the Government."

The Court of Claims obviously considered it most significant that materials, supplies and equipment in the gold mines were never requisitioned. The Court said, in its opinion (R. 19):

"Although WPB had full power to requisition any large inventories of supplies, materials, and equip-

²⁰ The Homestake mine was much the largest mine shut down (R. 95). No evidence was offered that anything was requisitioned from other mines.

ment owned by the gold mines, or to authorize more essential users of such materials to place mandatory orders with the gold mines, no such power was ever exercised."

And at R. 27:

"The record establishes that the Government did not intend to, nor did it ever, requisition any of this personal property or direct the mine owners to sell it to anyone else. From the language of the order itself and from the circumstances surrounding its promulgation, it is apparent that its only purpose was to deprive the gold mine owners and operators of their right to make use of their mining properties."

And at R. 32:

"Insofar as L-208 prohibited the mine owners from using any of the materials, supplies, equipment, machinery and facilities owned by them and on hand, that prohibition allocated nothing, i.e., it distributed nothing because the order contained nothing which required the gold mine owners to sell those items to the more essential users."

Finally, at R. 45:

"The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used in the mining of gold, and was part and parcel of the express order to cease doing business."

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Order L-208 expressly permitted the closed gold mines to "acquire, consume, or use any material, facility, or equipment . . . to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair,

and its access and development workings safe and accessible" (Finding 43, R. 102-103). This provision of the Order was not changed by either of the amendments on which the petitioner now relies (petitioner's brief, p. 115, 119). The theory of the Order, throughout, was that any closed mining enterprise would be kept in suitable condition for the prompt resumption of operations when permitted.

It will be recalled that when the estimate was made by Dr. Wilbur Nelson, Chief of the Mining Branch, of the number of hardrock miners who would be "released" by the closing of the mines, it was assumed that men could be kept to keep the mines "on a stand-by basis" (Finding 37, R. 99). And the minutes of the October 6, 1942 meeting of the WPB show that the WPB contemplated that there would be "standby operations" (Finding 41, R. 100).

Moreover, paragraph (b)(3), in permitting the use of any material, facility or equipment in the maintenance of respondents' properties, was intended to conserve such equipment and materials only for future use in gold mining. As the Court below said in its opinion (*italics in original*, R. 33-34):

"L-208 made specific provision for the gold mine operators to preserve their own critical machinery and equipment so that they, i.e., the nonessential owners, would have that equipment and machinery in good condition for use in gold mining when the limitation order was finally lifted.

"Paragraph (b)(3) of L-208 provided that no gold mine operator might acquire, consume or use any critical material, facility or equipment *except to the minimum amount necessary to maintain the gold mine's buildings, machinery and equipment in repair and its access and development workings safe and accessible.* Paragraph (c) of the order authorized the Director General for Operations of WPB to assign such preference ratings as

might be required to gold mine operators to enable them to obtain the minimum amount of critical materials necessary to maintain their nonessential mines on the basis set forth in subparagraph (b)(3), i. e., to keep their machinery and equipment in repair, *inter alia*.

"The above makes it quite clear that the 'conservation' brought about by L-208 with respect to the mining machinery and equipment owned by the mine operators was not the usual conservation purpose of a limitation order of WPB, i. e., conservation so that the equipment, machinery and materials owned by a manufacturer of nonessential products might be converted to the manufacture of essential end products either by the owner or by some manufacturer of an essential end product. Any actual conservation intended and brought about by that part of L-208 which prohibited the use of the gold mine owners' equipment and machinery for the mining of gold was for the purpose of conserving that equipment and machinery for future use by the nonessential gold mines in the production of non-essential gold."

In short, when the WPB issued L-208 it did not have in mind the permanent stoppage of gold mining as a result of which used machinery and equipment would be thrown on the market—it had in mind a temporary cessation of mining operations with the used machinery and equipment remaining, at least for the most part, right where it was.

The failure of the WPB to requisition any of the materials, machinery and equipment confirms this view of L-208. The WPB intended that, at least in the main, the gold mines would keep what they had. Any trickle from the mines was bound to be incidental and haphazard.

Chief Judge JONES of the Court of Claims took exception to the emphasis which the majority gave to the failure of the Government to requisition the materials, machinery and equipment. He said (R. 59):

"The majority concludes that those operators who had critical materials on hand are entitled to recover for the time that these materials would have allowed them to continue operation. In this respect the court seems to rely mostly on its conclusion that in so far as L-208 prohibited the use of critical materials on hand, it was arbitrary. The court bases this conclusion in turn primarily on the fact that the Government took no affirmative steps to allocate the materials 'away from' the gold mine operators into more essential uses.

We do not think this was necessary under the circumstances. If indeed these materials were critical, then it is natural to expect that, under the operation of supply and demand, such materials would find their way into essential uses. In fact it would have been wholly impracticable in a great national emergency for any agency of government to allocate and assign every bolt, nut, and piece of critical materials."

The fact that it would not have been practicable to requisition "*every* bolt, nut, and piece of critical materials" does not detract from the significance of the fact that *nothing* was requisitioned. If the need for critical materials, machinery or equipment had been a real factor in the issuance of L-208, at least *some* of the things which the closed gold mines had would have been requisitioned.

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In considering what incidental effects Order L-208 may have had, in the absence of any requisitioning, it is necessary to distinguish between (1) critical materials, and (2) used mining machinery and equipment (see above, p. 1-2).

As to critical materials, Chief Judge JONES argued that some critical materials were sure to be sold by the gold mines and that they were bound to find their way into the hands of essential industries (R. 59). The Chief Judge did not suggest that there is any evidence in the record as

to what incidental and haphazard effects L-208 may thus have had in diverting critical materials to essential industries.

The discussion of critical materials in the petitioner's brief is most ambiguous, because it fails to distinguish between (1) critical materials, and (2) "used mining equipment and machinery" (p. 61-69). Under the heading "*Results*" it refers to "used mining equipment and machinery" as "material" (p. 61). However, in a footnote it is admitted that (p. 64, Note 45):

"Neither the record nor the history of L-208 reflects data on the quantum or value of war material other than machinery and equipment which may have been channeled from idle inventories of L-208 mines into essential war enterprises."

The footnote then goes on to quote the statement by Chief Judge JONES to which we have just referred.

In short, there is nothing in the record on which to base even a guess as to the amount of critical materials which may have trickled from the closed mines to essential industries. Order L-208 was not intended to divert critical materials to more essential industries and there is no basis for an assumption that it had any significant effect in that connection.

As to used machinery and equipment, the petitioner says that "as a result of L-208, a reservoir of used mining equipment and machinery estimated to exceed \$75,000,000 became available for transfer to other mining activities and other enterprises of wartime value" (p. 22, 61). The original source of this estimate is a report by Edward H. Rott, dated May 23, 1943, entitled "Report on Gold Mine Order L-208" (Plaintiff's Exhibit 13, R. 857, 964, 1292-1301). The estimate included not only what was "normally recognized as essentially mining equipment" but also "tractors, draglines and trucks" (R. 1301).

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The petitioner says (p. 61) that "This material was 'pitifully short of requirements' (R. 1777)". But there is no page 1777 in the record; we have not been able to find what is quoted; and we do not know what the statement means.

The petitioner then says that "as of November 19, 1942, when L-208 was first amended, this material was moving into channels leading into essential work at the rate of \$82,600 per week" and that by April and May of 1943 "this transfer of material accelerated to the rate of \$100,000 per week" (p. 61-62). The original source of these statements is also Mr. Rott's report of May 23, 1943 (R. 1301).

The petitioner next projects the \$100,000 a week figure over the period to June 30, 1945, when Order L-208 was revoked, and on the basis of the projection the petitioner asserts that it is "a fair approximation that equipment of over \$12,000,000 in used value ultimately found its way from the nonessential gold mines into essential operations" (p. 62). The petitioner's brief then devotes almost three pages to comments on this asserted accomplishment of Order L-208 (p. 62-65).

Of course, the projection of the \$100,000 per week figure from May 24, 1943 to June 30, 1945 is the rankest sort of arbitrary assumption with respect to a matter on which it was certainly possible for the petitioner to obtain competent evidence.

Moreover, it would be plainly wrong to give Order L-208 all of the credit for whatever movement of machinery and equipment from the gold mines took place. The report of Edward H. Rott, the original source of all the petitioner's figures, with respect to equipment transferred from the gold mines, said (R. 1301-1302):

"However, very little of this was transferred from the three principal operators from which manpower was released by the order. How rapidly this equip-

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ment would have moved into strategic metal production if Order L-208 had not been issued is pure speculation, but we know it was under way. How much of the millions in used equipment still idle will remain so, cannot be estimated. This would largely be dependent on the length of the war."

In this entire discussion of the "reservoir of used mining equipment and machinery estimated to exceed \$75,000,000" which is asserted to have become "available for transfer to other mining activities and other enterprises of wartime value" (p. 22, 61-62), the petitioner has simply incorporated in its brief as statements of fact the substance of proposed findings which the petitioner asked both the Commissioner of the Court of Claims and the Court of Claims itself to make and which both declined to make after considering the objections thereto made by the respondent Homestake Mining Company. We quote in a footnote the Government's proposed findings of fact Nos. 48 and 49 as submitted to the Commissioner.²¹

²¹ "48. Upon the issuance of L-208 and the closing of the gold mines, over \$75 million worth of mining equipment previously used in gold mines, became available for other uses and this equipment, as well as idle inventories of material, began to move into channels leading to essential war effort usage. Such transfers appreciably accelerated strategic metal development although because of inadequate data and numerous variable factors, the degree of this acceleration was not and is not determinable.

The consumption of critical materials and supplies by the gold mines for repair, maintenance, and operating supplies was terminated. Purchases of materials and supplies, already reduced heavily by priority restrictions, were almost completely eliminated. (Pltfs'. Ex. 13A).

49. Strategic materials and supplies, the total value of which was estimated in 1943 at amounts from \$10,000,000 to \$20,000,000, were released from expected consumption by the gold mines closed by L-208. Approximately \$1,500,000 in equipment was transferred from the gold mines to essential nonferrous mines in the first few months after the issuance of L-208. These transfers accelerated strategic metal development (Deft's. Exs. 50 and 51; Pltfs'. Exs. 13A, 52 and 125)."

If that footnote is laid beside the discussion at pages 61-62 in the petitioner's brief (and the summary at p. 22), it will be seen that they are substantially the same. The respondent Homestake Mining Company made detailed and specific objections to the defendant's proposed findings 48 and 49 (Objections of Plaintiff Homestake to the Findings of Fact Proposed by Defendant, p. 97-102) and the Commissioner declined to make the requested findings.

In the Defendant's Exceptions and Brief filed November 5, 1954 with the Court of Claims, the petitioner tried to have the Court of Claims make the same Findings which the Commissioner had declined to make (p. 360-361). The respondent Homestake Mining Company objected in its Reply Brief dated December 20, 1954 (p. 521-522, 548-553) and the Court refused to make the requested Findings.

We cannot think that it is in order for us further to lengthen this brief by discussing in detail for the third time the proposed findings which the Commissioner and the Court of Claims were both asked to make and declined to make—the substance of which is now embodied in the petitioner's brief as if they had been made.

If it was the petitioner's purpose to make an argument about the "reservoir of used mining machinery and equipment", the petitioner's contention should have been that the Court of Claims had failed to make a Finding of Fact on a material issue (see the main body of this brief, p. 58-60, 63-64), and in that connection the petitioner should certainly have referred to the objections which were made before the Commissioner and the Court of Claims to the findings which the petitioner proposed.

The majority of the Court of Claims was not impressed by the incidental, speculative and haphazard consequences of L-208 which were disclosed by the record. The majority opinion said (R. 32):

"The fact that occasional voluntary sales of idle gold mining machinery were made to some more essential mines does not give to that part of L-208 prohibiting the owners from using those items to mine gold the character of an allocation order; it merely emphasizes the fact that those items were not 'taken.' "

As Judge LITTLETON indicated for the Court below (R. 19, 27), if machinery and equipment used by the gold mines were needed by the nonferrous metal mines, they could have been requisitioned.

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The petitioner contends that the Court below fell into error because it did not consider the effects of Priorities Regulation 13 and the amendments of Order L-208 which were made on November 19, 1942 and August 31, 1943. Mention is made *specifically* of Regulation 13 and of one or the other of the two amendments in at least at twelve places in the petitioner's brief (p. 10-11, 14 [Note 9], 16, 20-21, 22, 25; 50-53, 59, 60, 61, 104-107, 114-125), not including many places where they are referred to by implication without specific mention. Indeed, the petitioner's assumptions with respect to Regulation 13 and the two amendments pervade the petitioner's presentation of the alleged facts and its argument to such an extent that it would be most drastic surgery to eliminate them.

The petitioner's position with respect to Regulation 13 and the two amendments is extraordinary, to say the least.

In the first place, Priorities Regulation 13 and the amendment of Order L-208 on August 31, 1943 were not even made a part of the record in the Court below. A memorandum summarizing the amendment of November 19, 1942 is in the record (Defendants' Exhibit 3, at R. 1574C, 1574D and 1575), but there was no suggestion when the memorandum was introduced (R. 478-479) that it was of

any importance and a reading of the memorandum would not have indicated that it was.

In the Defendants' Exceptions and Brief in the Court of Claims, filed November 5, 1954, comprising 148 pages, there was no reference to Priorities Regulation 13 or to either of the two amendments.

Yet the petitioner makes this astonishing statement (p. 14, Note 9):

"In this connection, it is appropriate to note that, although the record discloses references to the November 19 amendment to L-208 (R. 479-482; 1574 C-D, 1575), neither the findings of the Court of Claims nor its opinions make any reference to the November 19 and 25,²² 1942 and August 31, 1943 amendments to L-208."

This certainly implies that the Court below was at fault in not taking notice of the amendments of Order L-208 and in not including any references thereto in its Findings. Why should the Court have been expected to do so, since no reference was made to either of them in the Commissioner's Findings, in the Defendants' Exceptions and Briefs or on the oral argument, and one was not even in the record?

The petitioner's repeated references to Priorities Regulation 13 and the amendments would suggest that the alleged error of the Court below with respect thereto was a major factor in its decision. The petitioner's brief summarizes the decision of the Court of Claims in such a way (p. 13-14) as to prepare the ground for a bold assertion at page 20 that the "decision of the Court of Claims that L-208 results in a 'taking' rests largely upon the mistaken belief that L-208 placed no restriction upon the disposition of idle

²² Note 6 in the petitioner's brief, at page 10, explains that the amendment of November 25, 1942 merely changed the time within which the inventory of equipment and machinery was to be submitted to the WPB.

material and equipment by operators of nonessential mines subject to L-208."

If the Court below had made a major error on a point of fact—an error resulting from an ignorance about, or failure to consider, Orders printed in the Federal Register—the Government could, and should, have called the error to the Court's attention on its motion for a new trial. On that motion the Government made no reference to the alleged errors of fact to which it now gives such prominence (R. 142-147).

The only reasonable explanation is that the able and experienced counsel for the Government before the Court of Claims did not believe that the error of fact, if there was one, was of any significance.

The petitioner's petition for certiorari did not fairly cover anything to do with the two amendments of L-208 (see the main body of this brief, p. 60-62). Apparently counsel for the petitioner decided after the writ was granted to try to bolster the petitioner's case by arguments and speculation relating to the amendments.

Let us now consider the alleged error with which the petitioner now charges the Court. It related to the restrictions on sales by the closed gold mines. Order L-208 placed no restrictions on such sales. Nor did any other order which was called to the attention of the Court.

The only restrictions which existed on October 8, 1942, and for more than a month thereafter, were in Priorities Regulation 13. As already stated, Priorities Regulation 13 is not in the record and was not referred to below. Nor is the text of it given in the petitioner's brief.

The petitioner's summary of Priorities Regulation 13 ends with the following sentence (p. 52):

"Thus, it is clear that only as to material other than war material were the mine operators free to do as they liked with material and equipment idled

by L-208; on the other hand, war material was subject to rigid WPB control."

This appears quite certainly to be a seriously incorrect statement.²³ Priorities Regulation 13 governed "special sales of idle or excess materials." 7 Fed. Reg. 5167-5173. The definition of a "special sale" expressly excepted "A sale of any tool, machinery, or other assembled commercial, industrial, production, agricultural, or household equipment." Hence, Priorities Regulation 13 did not restrict the sale of what the WPB later called "machinery and equipment".

It is true that the sale of "war material" was subject to the Regulation. In the sentence which we have just quoted from the petitioner's brief, the petitioner uses the term as though it were a generic term descriptive of all items needed for the war effort. In fact the term "war material" was a term defined in Priorities Regulation 13 to relate only to a list of what might be loosely described as "raw materials", contained in a schedule annexed to the Regulation. Furthermore, the Regulation contained exceptions in addition to that already mentioned and it also provided for several categories of "permitted special sales" of "war material", including sales to five different classes of buyers.

By citing an estimate made by the Homestake Mining Company of its requirements of various metals in 1942 (p. 52, Note 33) the petitioner apparently attempts to give the impression that Homestake had a substantial inventory of the "war material" referred to in Priorities Regulation 13 and that sales of such material would have been controlled by the Regulation. There is no basis for such an impres-

²³ While the quoted sentence is very involved, we read it as saying that the mine operators were not free to do as they liked with machinery. They were, since Priorities Regulation 13 did not regulate the sale of machinery.

sion. First of all, the figures quoted in Note 33 reflect a computation of the amount of base materials contained in various types of "equipment and repair parts and supplies" required by Homestake. To the extent that such "equipment and repair parts and supplies" fell into the category of a "tool, machinery, or other assembled commercial, industrial, production, agricultural or household equipment", sales of such items would have been expressly excepted from the Regulation. Furthermore, much the largest figure in Note 33 reflects a typographical error; the "8,453 tons fabricated iron and steel" should be "845.3 tons", a decimal having been omitted. The "80 (*sic*) tons mercury" should be "80 flasks of mercury".²⁴

It is hard to imagine a more complete lack of evidence than there is as to the extent, if any, that Priorities Regulation 13 restricted sales by the gold mines after October 8, 1942. The only thing that appears quite certain is the Regulation did not restrict their freedom to sell, to whomsoever they pleased, machinery and equipment.

On November 19, 1942, Order L-208 was amended so as to restrict the sale of "any machinery or equipment of the types listed in Schedule A to Preference Rating Order P-56 which has been used in a nonessential mine".

As already stated, a memorandum summarizing the amendment of November 19, 1942 was introduced into the record below as Defendant's Exhibit 3 (R. 478-479, 1574C, 1574D, 1575). When it was introduced (R. 478-479), there was no intimation that it was of any importance. The absence of any such intimation did not, of course, restrict the right of counsel to the Government to treat the Exhibit as important in their briefs, exceptions and argument in the Court of Claims. However, we have found no evidence

²⁴The explanations given above with regard to the figures quoted in Note 33 of the petitioner's brief appear at transcript pages 1616-1617 in a portion of the record which was not printed.

that the amendment was *ever* mentioned in anything that was submitted to the Commissioner or to the Court of Claims and we are certain that it was not mentioned on the oral argument.

The gist of the pertinent part of the memorandum (Defendants' Exhibit 3)²⁵ may be summarized thus:

"The nonessential gold mines have been closed. Now that that has happened, their operators '*may wish to sell*' critical mining machinery or equipment. The amendment is intended to control any such sales so that they will go to more essential rather than less essential mines."

The memorandum realistically treated the closing of the "nonessential" gold mines as an accomplished fact. It undertook to deal only with a consequence of that fact. It related only to any machinery and equipment which the owners of the lode gold mines might wish to sell. No attempt was made to require them to sell anything, or to requisition anything.

The memorandum explaining the amendment did not suggest that the purpose of L-208 was to channel mining machinery or equipment into more essential mines and that through inadvertence appropriate provisions had been

²⁵ The full text of the pertinent part of the memorandum reads:

"2. A provision freezing the machinery in nonessential mines. Operators of closed gold mines may wish to sell critical mining machinery or equipment. This should be controlled so that it will go to more essential rather than less essential mines. The proposed new paragraph freezes such machinery and equipment, but does not tie up small and standard operating supply items. Provision is made to have operators report promptly to the Mining Branch a description of all frozen machinery and equipment. The Mining Branch is setting up a unit to help in the speedy disposal of such machinery and equipment as the operator *may wish to sell*. The complete list will be available in case it becomes essential at a later date to requisition the other machinery and equipment."

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omitted. The amendment merely dealt routinely with an incidental consequence of the closure of the gold mines.

The memorandum explaining the amendment gave no indication that it had any special significance, the witness through whom it was offered did not suggest that it had, and it was never treated as of any significance by the Government before the Commissioner or the Court of Claims.

The amendment of August 31, 1943 (petitioner's brief, p. 118-125) is not in the record and was not referred to in any way before the Commissioner or the Court of Claims, either in writing or orally. The petitioner does not attempt to explain why the August 31, 1943 amendment was called for.

Even after the two amendments L-208 did not requisition anything or require the operators of the gold mines to sell anything.

In the light of the foregoing, two questions can be asked: What error, if any, did the Court below make? If the Court made any error, how significant is it?

The petitioner's brief quotes five statements in the Court's opinion (p. 50-51) which it characterizes as "demonstrably inaccurate." These statements refer to two very different things: (1) the absence of any requisitioning by the Government, and (2) the freedom of the owners of the gold mines to sell critical materials, equipment and facilities "to anyone they pleased."

The Court's statements about the absence of any requisitioning of critical materials, machinery or equipment were indisputably correct.

The Court's statements as to the effect of Order L-208 on the freedom of the owners of the gold mines to sell critical materials, machinery or equipment to "anyone they pleased" were also correct of the Order as issued (Finding 43, R. 102-105). Any restriction which had been previously imposed by Priorities Regulation No. 13 was apparently not

regarded as significant by counsel for the Government and was not called to the Court's attention. The restrictions imposed by the amendments of L-208 on November 19, 1942 and August 31, 1943, which were similarly not called to the Court's attention, did not make the Court's summary of the provisions of Order L-208, as issued, "inaccurate."

The petitioner would not seem to have any standing to contend that the Court of Claims would have been compelled to reach a different conclusion if counsel for the petitioner had called the amendments of November 19, 1942 and August 31, 1943 to its attention. In any event, it is clear that the two amendments have no legal significance.

The amendment of November 19 could not change the character of what was done on October 8. If there were a convincing showing that on October 8 the WPB issued Order L-208 with the intention of channelling machinery and equipment into the nonferrous metals mines and inadvertently omitted the provision which was added on November 19, a different case might be presented. But that is not what happened.

If there was a taking on October 8 through the issuance of Order L-208 for the purpose of maneuvering gold mine labor to the nonferrous metal mines, it certainly did not end on November 19 because of the issuance of the amendment, which merely undertook to deal routinely with one of the incidental consequences of the taking.

What we have said about the amendment of November 19, 1942 clearly applies also to that of August 31, 1943.

* * * * *

At pages 104-107 the petitioner's brief deals extensively with a meeting of the WPB held on June 15, 1943, at which the WPB determined that Order L-208 should be continued.

Although there was a major issue before the Commissioner and the Court of Claims as to the purpose of the

original issuance of Order L-208 (see above, p. 34-39), there was no issue below as to the purpose of the WPB in continuing the Order after it had taken the step of closing down the mines. The Commissioner made no finding on that subject; the Government's 24 pages of Exceptions to the Commission's Report (p. 350-373) contained no reference to the decision of the WPB on June 15, 1943 not to revoke the Order and the Court of Claims made no Finding.

If an issue had been raised below as to the reason why the Order was not revoked in June, 1943, it would have been pertinent to consider the Report, dated May 24, 1943, of Edward H. Rott, the Deputy Administrator of L-208 (Plaintiff's Exhibit 13, R. 857, 964, 1292-1311).

Mr. Rott thought that L-208 was a mistake; he said (R. 1300):

“The magnitude of the effect of this order is very great, with but extremely limited accomplishment. The losses entailed by all mines through forced closing under Order L-208, promptly became potential claims for post war adjustment. Those claims are cumulative.”

However, he thought that it was better policy not to acknowledge the mistake, and he opposed a revocation of the Order for that reason (R. 1304):

“The general effect of the Order has been to antagonize the individual and the communities dependent on gold mining, and caused large losses to the operators. To repeal it would not calm the situation, but would stir up increased resentment from the many who have lost their liv-lihood (*sic*), relinquished leases, forfeited equity in equipment, or sold equipment in anticipation of no farther need for the duration.”

Since there was no issue below as to the reason why L-208 was not revoked in June, 1943, the mat .ial on pages

104-107 of the petitioner's brief could be pertinent only on the question whether the Order was a practical failure. Apparently, therefore, the petitioner has devoted three pages of its brief to the June 15, 1943 meeting (including two pages of quotation from the minutes of the meeting) in an effort to bring before the Court the statistics quoted at that meeting in support of the proposition that Order L-208 had been responsible for an increase in the production of nonferrous metals, for transfers of essential equipment and for the conservation of critical materials. However, *the minutes of the WPB meeting of June 15, 1943 (Defendant's Exhibit 51, R. 1605) were not received in evidence as proof of the figures contained therein.* The Defendant's Exhibits 49, 50 and 51 (R. 1599, 1601 and 1605) were all objected to by counsel for the respondent Homestake Mining Company on the ground that those Exhibits were not competent proof of the facts related and the figures set forth in them, and all three were received only for limited purposes (R. 963-966). The minutes of the WPB meeting of June 15, 1943 were received in evidence for the limited purpose of showing "the action taken by the Board and the discussion within the Board pertaining to the possible revocation of the Order" (R. 966).

Furthermore, the substance of many of the "facts" reported to the WPB at the June 1943 meeting, or conclusions sought to be drawn from them, were embodied in proposed findings of fact which the petitioner asked both the Commissioner of the Court of Claims and the Court of Claims itself to make. Both the Commissioner and the Court declined to make such findings on considering the objections thereto made by the respondent, Homestake Mining Company.²⁶ The petitioner does not now make any

²⁶ Compare the material at page 105 of the petitioner's brief with petitioner's proposed findings Nos. 48 and 49 quoted above at page 56.

With respect to the estimate made at the WPB meeting that the

contention that the Court of Claims erred in failing to make the findings which it proposed. Instead the petitioner has attempted to embody the substance of its rejected findings in its brief by quoting, without qualification, from a document which was received in evidence for only a limited purpose.

V

The practical failure of Order L-208 to serve the purpose for which it was issued: the transfer of a substantial number of hardrock miners to the nonferrous metal mines.

As to the results of Order L-208, the Committees of the Congress concluded that (Plaintiff's Exhibit 178; R. 855, 1559, 1562):

closing of the gold mines had resulted in a net gain in the 1943 output of nonferrous metals and had also resulted in transferring gold miners to "other war industries" (see petitioner's brief, p. 105) it is pertinent to note that this material is substantially similar to the petitioner's proposed finding, No. 52 in the Court below. That proposed finding read:

"A result of the issuance of L-208 was the transfer of workers in the gold mines to other non-ferrous mines and to war industries. The degree of this transfer is not determinable because of inadequate statistics and numerous variable factors which precluded a definite calculation. However, L-208 was effective in that the transfers which occurred appreciably accelerated the mining of critical metals and were beneficial in respect to labor shortages in other war industries (Tr. 1496, 1503-1511, 1524-1527, 1553-1554; Pltfs'. Exs. 13A and 125)."

Actually the estimate that there had been a net gain in the production of nonferrous metals was predicated on the assumption that 500 hard-rock miners had transferred to the nonferrous metal mines (Defendant's Exhibit 50, R. 1604) and, in retrospect, the report of the WPB Policy Analysis and Records Branch concluded that (Plaintiff's Exhibit 1, R. 149, 1163, 1231):

"... since the number of gold miners actually re-employed was negligible, their contribution in increased production of copper, lead, zinc, etc., was likewise small, and probably was counterbalanced by the loss of such metals as are normally produced as by-products of gold mining."

"The net results of the order in accomplishing its avowed primary purpose of channeling manpower to 'essential' mines were negligible."

The Findings of the Court of Claims are in accord with this conclusion of the Congressional Committees, and they are abundantly supported by the evidence.

The Findings also set forth in detail their reasons why, as the Court of Claims found (Finding 51, R. 107), there was no "justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines".

The summary of the facts in the petition for certiorari.

The story of L-208 was told quite fairly in the petition for certiorari.

After explaining that by March 2, 1942 "the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies", the petition said (p. 5):²⁷

"In the summer of 1942, the Labor Division of the War Production Board became concerned with the problem of an acute shortage of hardrock or underground miners in the vital non-ferrous copper mines. The primary reasons for this shortage were the draft, and the migration of workers out of the mine fields because of higher wages and better working conditions in other war industries. Accordingly, it was suggested to the War Production Board that, if the gold mines were closed, the unemployed miners would probably be diverted to copper mining, thereby alleviating a shortage which severely threatened the national war effort. In this connection, it was

²⁷ In quoting from the petition for certiorari we have omitted the citations to the pages of the Appendix to the petition which contained the Findings of the Court of Claims.

recognized that there was no authority to require the miners to transfer to industries in which their services were more urgently required; and further that the workers thus made available by the closing of the gold mines might very well go to work in the West Coast war plants instead of in the non-ferrous copper mines."

The petition then summarized the provisions of the Order and told about its results as follows (p. 6):

"Notwithstanding the Order, only an insignificant number of hardrock miners actually transferred to the copper mines. Eventually, the acute labor shortage in the copper mines was alleviated by the Army's granting of furloughs to four thousand men for work in the copper mines—an action the Army had not been willing to institute so long as the gold mines continued in operation."

It is hard to conceive of a more radical change of position than is to be found in the treatment of this subject in the petitioner's brief.

The pertinent statistics relate to hardrock miners employed by gold mines which did not produce substantial quantities of critical materials and hence were closed down by Order L-208.

The shortage which was responsible for Order L-208 was a shortage of miners and muckers, referred to in the record as "hardrock miners" (Finding 20, R. 77; Finding 47, R. 106; Finding 51, R. 107). Muckers are the men who remove the broken ore or muck. The term "miners" was sometimes used to cover muckers as well as miners who break the ore; sometimes there are references in the record to "miners and muckers" (Finding 36, R. 98) or to "hard-rock miners and muckers" (Finding 37, R. 98). The men who work lode gold mines underground are called "hard-

rock miners" because the gold is "mainly [in] narrow quartz veins in hard rock" (R. 1206).

The ultimate Findings of the Court of Claims, that the shortage was one of hardrock miners (not of mine employees generally), are fully supported by evidentiary Findings. When the representatives of the gold mining industry met with the WPB on October 1, 1942, Dr. Wilbur A. Nelson, the Chief of the Mining Branch, undertook to ascertain, and on October 3 he reported as to, the number of "hardrock miners and muckers" who were employed by the gold mining companies (Findings 36, 37; R. 98-99). When the two Under Secretaries sent their memorandum of October 5, 1942, they spoke of "hard-rock miners engaged in gold mining" (Finding 40, R. 99-100). The minutes of the October 6 meeting of the WPB referred to the number of "hard-rock miners", although giving other statistics also (Finding 41, R. 100). General Somervell's letter of October 11, 1942 said that (Plaintiff's Exhibit 127, R. 520, 1510-1511):

"The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort."

It follows that statistics about mining company employees (including employees in the mills, offices and other installations on the surface), as distinguished from hard-rock miners (miners and muckers), were and are meaningless and confusing.

Another source of confusion, which the petitioner has perpetuated, involved the use of figures relating to all mining companies that produce gold, whether they were shut down by Order L-208 or not. The great copper mines produce large amounts of gold and other mines which are exploited primarily for gold produce significant amounts

of lead, copper or zinc (Findings 20, 25; R. 77, 83). The only pertinent statistics are those that relate to the gold mines which did not produce "substantial quantities of critical materials" (Finding 17, R. 74-75) and which were shut down by Order L-208.

Both of these two kinds of confusion affected the first statistics that were cited by a Division of the WPB. Finding 20 reads in part (R. 76-77):

"On July 4, 1942, the Acting Chief of the Priorities Branch of the Labor Production Division [of the WPB] sent a memorandum to the Director of Operations of the War Manpower Commission who was also in charge of the Labor Supply functions of WMC at that time. The memorandum pointed out the acute labor shortage in the nonferrous metal mining industry and observed that the 15 largest producers of gold in seven Western States had some 6,700 employees; that the gold mines of these producers were sometimes located in the vicinity of nonferrous metal mines and that in some cases one company would own both a gold mine and a nonferrous metal mine in an area. The statistics upon which the above figures were based were as of 1941, and were later found not to represent the situation in the summer of 1942, because the gold mines, as well as the nonferrous metal mines, had been losing workers to the war industries and the draft. *The 6,700 figure employed in the memorandum represented employees of all kinds, including clerical employees, and no figure was given of the number of hardrock miners which were the type of employee needed in the nonferrous metal mines. In speaking of the '15 largest producers of gold in seven Western States', the memorandum did not point out that several of such gold producers also produced nonferrous metals in substantial quantities and therefore would not be classified as gold mines for the purpose of any anticipated action.*"

The petitioner's brief gives, almost verbatim, the sentences which we have not italicized (p. 93).²⁸ Then in a footnote the petitioner says that "The 6,700 figure appearing in the memorandum represented employees of all kinds and no figure was given as to the number of hard-rock miners—the type of employees most needed in the non-ferrous metal mines." (Note 15). By inserting the word "most" the petitioner has changed the sense of the Finding, which was that "hardrock miners * * * were *the* type of employees needed in the nonferrous metal mines". Furthermore, the petitioner has completely omitted the italicized portion of the Finding which pointed out that "the 15 largest producers of gold in seven Western States" included mines that "produced nonferrous metals in substantial quantities and therefore would not be classified as gold mines for the purpose of any anticipated action."

The only significant statistics relate to the hardrock miners employed by the gold mines which were shut down.

The Court of Claims was right in finding that "in issuing L-208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines."

The WPB acted under pressure from the War Department, in disregard of the only study of the number of hardrock miners in the gold mines which were shut down and oblivious to the factors which would keep more than a small percentage of the released miners from transferring to the nonferrous metal mines.

The Court of Claims found (Finding 51, R. 107):

"It is reasonable to conclude that in issuing L-208 WPB acted without any justifiable anticipation

²⁸ The last sentence not italicized is given by the petitioner in its footnote 15.

that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines."

In citing the abundant support for this Finding, we will review the period from the beginning of July, 1942 to the issuance of Order L-208 on October 8, 1942, with particular reference to the Findings that are pertinent in considering the audacious assertion in the petitioner's brief that the WPB acted "on the basis of repeated and careful studies" (p. 16, 25).

It will be recalled that the shortage of miners in the nonferrous metal mines had become acute by early July, 1942. Finding 18 sets forth the reasons for the shortage (R. 75):

"The reasons for the poor production of non-ferrous metals were found to be (1) the out-migration of workers in the nonferrous mines to other war industries offering higher wages and better working conditions, (2) drafting of the workers for the armed services by Selective Service, (3) excessive labor turnover within the industry, (4) low morale of the workers, (5) the short workweek in the mines, and (6) the lack of an organized and effective program of recruitment of workers for this industry."

On July 4, 1942 the Labor Production Division of the WPB prepared the confused memorandum about the labor shortage in the nonferrous metal mines which we have already discussed (see above, p. 72-73).

On August 14, 1942, Dr. Wilbur A. Nelson, Chief of the Mining Branch of the WPB, stated in a memorandum (Finding 22, R. 79):

"The present critical situation developed when copper, lead, zinc, mercury and other miners left their jobs and went to the West Coast on shipbuild-

ing and on aircraft jobs, and into the mountain areas in new war industries work.

If we close down the gold mines while these same opportunities are available for work at substantially high rates of pay in other war industries, the miners will not move to a copper, lead or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast.

Logic dictates this, for when a copper miner at Butte is willing to leave his home and go to the coast, I am sure that a gold miner, living in the excellent living conditions at Lead, is not going to leave his family and stop at Butte if he could go to the west coast."

Late in August, 1942, Mr. Guy N. Bjorge, the General Manager of the Homestake Mining Company conferred with several officials of the WPB and (Finding 23, R. 79-80):

"In the course of these conferences Mr. Bjorge furnished figures as to the small number of men who might be obtained for work in the copper mines by such order. He pointed out that many men had already left the Homestake Mine in 1942 for the same reasons that men had left the copper mines, mainly to accept employment at West Coast aircraft factories and shipyards. Mr. Bjorge also pointed out that the miners remaining at Homestake were an older, more stable class of men, a large percentage of whom were home owners, and asserted his belief that it was improbable that they would leave their homes for the poor housing facilities and undesirable working conditions at the nonferrous metal mines."

On August 26, 1942, Senator McCarran of Nevada wrote a letter to the Chairman of the WPB setting forth various reasons why he believed the proposed closing of the gold

mines would not accomplish its purpose of obtaining any considerable number of miners for the nonferrous metal mines (Finding 24, R. 80). Senator McCarran wrote, *inter alia*:

"In the first place, the transfer of necessary labor from closed gold and silver mines to mines producing copper, lead, zinc, etc., would be negligible, due to the fact that very few operations exist today where only gold and silver are mined, and in these districts (mainly, the Homestake Mining activity in South Dakota and the Mother Lode Mining district in California), the number of men who could be so transferred is small. Many of the usual workers have joined the armed forces; many are familiar only with the routines of this type of mining and cannot be successfully transplanted. Thus little good would result and great hardships would be inflicted upon affected families and communities.

Secondly, there is no rule or procedure by which such workers could be legally forced to transfer to other mines. The labor that would be denied employment by reason of the shutting down of the mines producing gold and silver would most likely go to the places where they would receive higher wages than are paid in mines."

On September 1, 1942, the WPB held a meeting, the minutes of which show that Mr. R. J. Lund, Chief of the Miscellaneous Minerals Branch (Finding 27, R. 85), reported that there was "general agreement that the higher wages paid to workers in competing occupations in other industries are the prime factor causing the out-migration of labor from the [nonferrous] mines and mills" (Finding 25, R. 82). Mr. Lund gave some supporting detail (*id.*).

At the same meeting, Mr. H. O. King, Chief of the Copper Branch of the WPB (Finding 22, R. 78) made a statement that an order had "been prepared to prohibit

the use of materials in nonessential gold mines, which may free about 8,000 workers" (R. 83). There is no explanation as to where the figure came from or what was meant by the word "workers".

On September 9, 1942, Mr. R. J. Lund, Chief of the Miscellaneous Minerals Branch, submitted to the Deputy Director General of Operations a memorandum, which has already been discussed at pages 15-18 (Finding 27, R. 85-90). In that memorandum he said (R. 86):

"Based on 1941 data, latest available from the Bureau of Mines, approximately 12,400 employees in lode gold mines will be thrown out of work by the order. Incomplete data indicate that about 70 percent of this labor is employed underground."

He then gave the geographic distribution of most of the 12,400 employees.

The use of 1941 figures made this part of Mr. Lund's memorandum worthless. That will be immediately apparent from an examination of the graph which is Appendix C to Plaintiff's Exhibit 1 and which shows the sharp decline in gold mining after 1941 (R. 1244A).

On September 15, 1942, the Interdepartmental Committee on Non-Ferrous Metals met and (Finding 30, R. 93):

"Mr. Harbison [Army representative] expressed some concern over the delay in issuing the gold order. * * * He made it clear that the War Department was impatient at the delay."

The War Department was already "impatient at the delay", although there had not yet been anything which remotely approached a careful effort to find out how many hardrock miners would be "released" or to make an estimate of the percentage of those who might be induced to go to the nonferrous metal mines.

On September 15, 1942, Mr. Morris Creditor, Special Assistant to Chairman Nelson of the WPB, wrote his memorandum to the Chairman, which has already been quoted and in which he said (Finding 31, R. 95):

"Even aside from the possible dissipation of these skilled miners into other occupations, there is a question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally, will be stuck in Alaska. Where are they expected to go?"

On September 30, 1942 there was a conference at Mr. Batt's office, which has already been referred to (see above, p. 24-25). At the conference: "Some discussion arose as to the number of gold mine employees who would be released by such a closing order" (Finding 35, R. 97). The Finding does not indicate that there was anything except discussion.

On October 1, 1942, the gold mining industry had its first opportunity to protest against the proposed L-208. Much of the Finding about the conference at the WPB on that date, which has already been mentioned (see above, p. 25-26), relates to the number of miners who would be affected by a close down of the gold mines and as to the prospects that they would move to the nonferrous metal mines (Finding 36, R. 97-98):

"At the opening of the meeting Mr. Batt stated that he had brought the gold mine operators to Washington to tell them that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines. In justification of such an order, Mr. Lipkowitz of WPB's Labor

Division stated that there were between 10,000 and 12,000 men who were then employed in the gold mines. The gold mine owners immediately protested that the figures stated were completely inaccurate; that the gold mines had already lost their most active men who had either gone to the shipyards and aircraft plants on the West Coast or had been drafted into the Armed forces; that the miners remaining in the gold mines were settled residents of their communities and that it was doubtful that they would move away to work in the copper mines if the gold mines were closed.

"In response to General McSherry's statement that the need for underground workers in the copper mines was urgent, Mr. Bjorge of Homestake pointed out that it was unreasonable to hope that gold miners would accept the jobs which the nonferrous metal miners were already leaving for more desirable employment, and that it was more likely to expect that miners forced to leave Homestake would go to the same type of more desirable jobs to which the copper miners were going.

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Late in the meeting, Wilbur A. Nelson undertook to determine how many miners and muckers would actually be released by a closing order."

The conference on October 1, which lasted for approximately five hours (Finding 36, R. 97), evidently made an impression on Vice Chairman Batt of the WPB. For on that very day he sent a memorandum to the Chairman of the WPB, saying (Finding 38, R. 99):

"Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure."

However, the next day, October 2, the Under Secretary of War sent Mr. Batt a strong letter urging the closing of the gold mines (Finding 39, R. 99). He said:

"The matter has hung fire for some time, and I trust that there will be no further delay."

The following day, October 3, Dr. Wilbur A. Nelson, Chief of the Mining Branch of the WPB (R. 66), made his report to Mr. Batt (Finding 37, R. 98, 99):

"He reported that while there were 3,270 workers employed by gold mining companies at that time, only 896 of them were hardrock miners and muckers. He further reported that approximately 300 of these men would be needed to maintain the buildings, machinery and equipment in repair, and the access and development workings safe and accessible as provided for under the proposed order. His report concluded that if all the gold mines and dredges in the United States were put on a stand-by basis, it would make available only about 600 miners and muckers for other mining enterprises 'provided they [could] all be induced to go into other mines.'"

This was the *first* attempt to find out in any systematic way the *maximum* number of hardrock miners and muckers who would be thrown out of work by the close down order, some of whom might be expected to gravitate to the non-ferrous metal mines.

Dr. Nelson's figure, 896, is to be contrasted with the "6,700 employees" of "the 15 largest producers of gold in seven Western States" previously mentioned (see above, p. 72-3); with the reference made by Mr. H. O. King on September 1, 1942 to "about 8,000 workers" (see above, p. 76-77); with the statement in Mr. Lund's memorandum of September 9 that, based on 1941 data, there were about "12,400 employees in lode gold mines", of whom "about 70 percent" were said to be employed underground (see above, p. 77); and with the statement made by Mr. Lipkowitz at the October 1 meeting "that there were between

10,000 and 12,000 men who were then employed in the gold mines" (see above, p. 78-79).

But Dr. Nelson's study did not influence the course of events. Indeed, his study did not even slow down the momentum towards a shutdown of the gold mines which had developed when wildly inaccurate and confusing figures were being tossed about.

For on October 5, 1942, the Under Secretaries of War and the Navy sent their memorandum, which we quote again because it is so pertinent to the subject we are now discussing (Finding 40, R. 99-100):

"The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.

There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.

The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.

The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided."

There is nothing in the record to suggest the origin of the estimate that there were from "two thousand to three thousand hard-rock miners engaged in gold mining", which was the stated basis for the equivalent of a direction to the WPB to issue Order L-208. Evidently it was

realized that the earlier estimates were worthless and the Under Secretaries did not purport to accept them.

At the WPB meeting of October 6, 1942, at which the issuance of Order L-208 was agreed upon Vice Chairman Batt reported that (Finding 41, R. 100):

"On conferring with Brigadier General McSherry of the War Manpower Commission and representatives of the gold mining companies, it had been found that at present the gold mining industry employs 3,270 workers; 750 are engaged in dredging and only 896 are hard-rock miners."

Apparently both the WPB and the War Manpower Commission accepted Dr. Wilbur Nelson's figures.²⁹

With a mere 896 hardrock miners in the gold mines which would be closed down, only about 600 would be available for other occupations, since approximately 300 would be needed for standby maintenance (Finding 37, R. 98, 99).

Furthermore, there was no reasonable prospect that a large percentage of the 600 would find their way to the nonferrous metal mines. The reasons why the prospects were poor have already been adverted to (see above, p. 73-76). The Court of Claims found (Finding 50, R. 106-107).³⁰

"50. On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of

²⁹ Reference was also made to the release of other Homestake "workers":

"Loss of labor to the Services and to war industries, and higher costs have already sharply curtailed operations of all domestic mines except Homestake. Homestake's labor force has dropped from a peak of slightly over 2,000 workers to 1,876, including lumbermen and machine shop workers. If Homestake were shut down except for standby operations, all but 500 of these workers could be released for work elsewhere."

³⁰ The omitted portions of this Finding relate to other subjects and have been quoted elsewhere.

L-208 knew (2) that the closing of the gold mines would release only a small number of hardrock miners and helpers; (3) that no agency of the Government had the power to compel these men to accept employment in the nonferrous metal mines; (4) that in all likelihood unemployed gold miners would accept employment in shipbuilding, aircraft and construction industries rather than go to work in the nonferrous metal mines where wages were low and working and living conditions poor; (5) that L-208 was not in fact directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i.e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners; (6) that a substantial number of the employees of the gold mines were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible;

That is what the record shows. Yet the petitioner's brief says twice that the WPB acted "on the basis of repeated and careful studies" (p. 16, 25)!

The results of L-208 in transferring hardrock miners to the nonferrous metal mines were negligible.

The Court of Claims found (Finding 47, R. 106):

"47. The closing of the gold mines did very little to relieve the manpower shortage in the nonferrous metal mines because (1) a relatively small number of the type of workers needed in those mines, i.e., hardrock miners, were released (finding 37); (2) a number of these men were required to remain in the gold mines to keep them in safe condition; (3) the older and more settled experienced miners remained in their home communities doing what they could to make a living or remaining idle; (4) most of the younger hardrock miners released sought employ-

ment in the better paying war industries, construction projects, or were drafted in the armed services. *Approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year."*

Finding 52 contains an excerpt from the Report which was made in May, 1944 by the Policy Analysis and Records Branch of the WPB (R. 111):

"It is generally agreed by the WPB divisions concerned with mining activities that a very small percentage of the released gold mine workers actually were employed by other mines. A majority of them probably went into work of greater value to the war effort than gold mining, such as lumbering, agriculture, construction, shipbuilding, aircraft manufacture;⁹⁶ but the fact remains that the primary justification for closing the gold mines was to get labor for the production of the strategic metals. Wilbur Nelson, Arthur S. Knoizen, present Director of the Mining Division, and F. H. Hayes, Chief of the Primary Production Branch of the Copper Division, concur in the statement that the number of gold mine workers who went into other mines and remained there for a year or more was not over 100.⁹⁷

⁹⁶ A partial analysis based on the records of the Social Security Board, indicates that the released gold mine workers went into a wide variety of occupations, including in addition to those mentioned in the text, coal mining, steel working, communications, transportation, and many others; they scattered, in short, through a fair cross-section of American industry. Letter, John J. Vorson, Director, Bureau of Old Age and Survivors Insurance, Social Security Board, to Stacy May, October 22, 1943.

⁹⁷ Wilbur Nelson and Arthur S. Knoizen, in interviews with the writer, March 7, 1944; F. H. Hayes, in an interview with writer, March 4, 1944."

The petitioner's brief says that "the success or failure of L-208, as an instrument for the diversion of manpower, remains a debatable question, difficult to resolve because of the understandably inconclusive information available with respect to the post-L-208 migrations of gold mine workers" (p. 65). It should not be debatable in this Court, because it was debated and decided in the Court of Claims and it would be preposterous to say that the Findings of the Court of Claims are not supported by substantial evidence.

The petitioner's brief now says that, "whether the limited finding of the Court of Claims is accepted, the incontrovertible fact is that the manpower displaced by L-208 did not disappear from the face of the earth, but in part moved to essential nonferrous mines, as WPB hoped, and to essential enterprises (R. 1230-1231) just as WPB anticipated" (p. 68, footnote omitted; see also p. 2). The petitioner's present position is radically different from the position which the petitioner took in the petition for certiorari.

In the petition for certiorari this Court was correctly told that the problem involved "an acute shortage of hard-rock or underground miners in the vital non-ferrous copper mines" (p. 5) and that (p. 6):

"Notwithstanding the Order, only an insignificant number of hardrock miners actually transferred to the copper mines. Eventually, the acute labor shortage in the copper mines was alleviated by the Army's granting of furloughs to four thousand men for work in the copper mines—an action the Army had not been willing to institute so long as the gold mines continued in operation."

Thus, the Court was told two very important things: first, that the Order was a practical failure and, second, that the Order was the result of the insistence of the Army

that it be issued if the Army was going to grant furloughs to miners.

We do not know what the petitioner means when it now refers to "the limited finding of the Court of Claims" (p. 68). We do not look upon the Findings of the Court of Claims (of which there were several) as "limited" except in the sense that all findings are necessarily limited. The Court of Claims made ample Findings which are ignored by the petitioner except for its reference (p. 67) to the portion of Finding 47 which stated that "approximately 100 hardrock miners are known to have gone to work in the non-ferrous metal mines and to have remained there for a year".

It is true that when the gold miners were thrown out of work by L-208 they "did not disappear from the face of the earth", although in Lead, South Dakota, it might have been supposed that they had, since "more than 750 homes and apartments were left vacant and boarded up, and 36 business establishments which had served the communities were left vacant" (Finding 71, R. 115-116).

The petitioner's statement (p. 68) that the displaced miners "in part moved to essential nonferrous mines, as WPB hoped, and to essential enterprises (R. 1230-1231)"⁸¹ just as WPB anticipated," is not followed by a reference to any part of the record which supports the implication that the WPB threw the gold miners out of work in anticipation that a significant portion of them would move to essential industries other than nonferrous mines.

Earlier in the brief, and in a more prominent place (p. 8-9), the petitioner says that Order L-208 was issued "upon the expectation that a sizable number of the laborers released by a further restriction of the gold industry would be diverted to the nonferrous metal mines *as well as other*

⁸¹ The citation here is to the paragraph of the Report of the Policy Analysis and Records Branch of the WPB which we have quoted at p. 84 above.

essential industries (R. 86-87, 92)". The record affords no support for the petitioner's implication that L-208 was issued with a view to having gold miners diverted to essential industries other than nonferrous metal mines. At both places cited by the petitioner the references are to *specific* nonferrous metal mines³² and to *other* nonferrous metal mines,³³ not to essential industries other than nonferrous metal mines.

On the contrary, the record establishes quite clearly that the WPB did not want to have the trained underground gold miners, thrown out of work by the Order, go to work in essential businesses other than nonferrous metal mines.³⁴

³² Copper at R. 87 and copper, lead and zinc at R. 92.

³³ The reference at R. 87 is to "other nonferrous metal mines", while that at R. 92 is to "mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc."

³⁴ The memorandum, dated July 4, 1942, of the Acting Chief of the Priorities Branch of the Labor Production Division of the WPB, quoted at page 12 above, said that "it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast" (Finding 20, R. 77-78).

The memorandum dated August 14, 1942 of Dr. Wilbur A. Nelson, Chief of the Mining Branch, quoted at pages 74-75 above, expressed great concern that the miners "will not move to a copper, lead, or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast" (Finding 22, R. 79).

On September 15, 1942 Mr. Morris Creditor, Special Assistant to Chairman Nelson of the WPB, wrote a memorandum (quoted in full at p. 21-22) in which he expressed concern over "the possible dissipation of these skilled miners into other occupations" (Finding 31, R. 95).

Before L-208 was issued, the Chairman of the War Manpower Commission issued a directive on October 7, 1942, the purpose of which was to try to have all of the miners who would be thrown out of work by L-208 go to "essential nonferrous metal mining, milling, smelting, and refining activities" (Finding 44, R. 105).

Immediately after L-208 was issued, Chairman Nelson of the WPB and Chairman McNutt of the War Manpower Commission issued a statement "appealing to all workers in gold mines to transfer to nonferrous metal mines and not to other war industries" (Finding 45, R. 105).

In discussing the alleged accomplishments of L-208 the petitioner relies largely on a report made by the United States Employment Service (USES) on November 5, 1942 (Plaintiff's Exhibit 99; R. 438, 1495-1497). Much the largest part of that report relates to "the great Homestake mine". The petitioner ignores completely two long Findings which cover what happened at the Homestake mine (Findings 68, 69; R. 114-115). By comparing those Findings with the statements in the petitioner's brief which are based on the USES report, it will be found that the words "gold mine workers" and "workers", as used in the petitioner's brief, include personnel who were not even in the mining department of the Homestake mine, and that of the men in the mining department less than half were miners.

At page 66 the petitioner's brief sets forth certain points on which, it is asserted, "the Vice-Chairman of WPB was advised," and the figures are certainly superficially impressive—especially the assertion that as a result of L-208 "11,000 tons of copper, 4,000 tons of zinc, 2,400 tons of lead, 13,000 units of tungsten, and 6,000,000 pounds of molybdenum were added to the annual production of these metals". The advice cited by the petitioner was contained in a report made by Mr. Edward T. Dickinson, Jr., Executive Director, Planning Committee, dated April 22, 1943 (Plaintiff's Exhibit 125, R. 456, 1503-1504). The portions of that report cited by the petitioner were literally torn to shreds in a memorandum prepared by Dr. Wilbur A. Nelson, Chief of the Mining Branch, dated April 30, 1943 (Plaintiff's Exhibit 52, R. 454, 1352-1356). For example, with respect to the assertion that "6,000,000 pounds of molybdenum were added to the annual production", Mr. Nelson's memorandum said (R. 1355-1356, emphasis in the original):

"The 6,000,000 pounds of additional molybdenum to be produced by workers from the gold mines was based on the figure of 125 workers from the gold mines working at Climax, whereas only ten such men are working at this mine at the present time. This would reduce this estimate from 6,000,000 pounds to a few thousand pounds of additional molybdenum. The 6,000,000 pounds of additional molybdenum which it is stated will be produced by the workers from the gold mines in 1943 is an absurd figure, as it represents 15% of the annual production of Climax, and such variation would be impossible. Actually the mine production at Climax for the first three months of 1943 is 10% below the last quarter of 1942."

The next document referred to by the petitioner is a report which was transmitted on May 26, 1943 to Mr. Knoizen, the Director, Mining Division, WPB, and Administrator of L-208 (p. 66-67). The report itself, which was dated May 24, 1943, was made by Edward H. Rott (Plaintiff's Exhibit 13, R. 857, 1292-1311). The petitioner gives some statistics which will be found in a table at R. 1299 (p. 66-67). It was explicitly stipulated that the "statistics, figures, and so on" in Mr. Rott's report "are not proof of those facts" (R. 964). On the other hand, there was no restriction on the admissibility of Mr. Rott's expression of over-all judgment (R. 1300):

"The magnitude of the effect of this order is very great, with but extremely limited accomplishment. The losses entailed by all mines through forced closing under Order L-208, promptly became potential claims for post war adjustment. Those claims are cumulative."

The petitioner's brief next attempts to distort the whole picture by suggesting that (1) there was a conflict between

Dr. Wilbur Nelson, who was Chief of the Mining Branch of the WPB in 1942 and 1943, and everyone else, including the USES and the War Manpower Commission (WMC) and (2) that the conflict related, among other things, to whether or not the statistics should be limited to "underground miners and muckers" (p. 67-68).

The suggestion that Dr. Nelson was in conflict with everyone else is as far from the fact as could be imagined. The report made in May, 1944 by the Policy Analysis and Records Branch of the WPB shows that those who concurred in the statement that "the number of gold mine workers who went into other mines and remained there for a year or more was not over 100" included not only Dr. Nelson but Arthur S. Knoizen, who on May 26, 1943 was the Director of the Mining Division and Administrator of Order L-208 and is mentioned at page 66 in the petitioner's brief, and also F. H. Hayes, the Chief of the Primary Production Branch of the Copper Division (Finding 52, R. 111).

The petitioner is quite correct in stating that there was and is a conflict between the statistics which related to underground miners and muckers and those which related to employees of gold mining companies generally. We referred to that conflict above and established that the only pertinent statistics are those which related to "hard-rock miners and muckers" (p. 70-73).

The petitioner says (p. 67-68):

"If L-208 is to be judged by the number of gold miners transferred to essential mines and other enterprises, the court's finding, confined as it is to 'hardrock miners' who remained in the nonferrous metal mines for a year, is arbitrary on its face (R. 994-995) and affords no sound basis for a conclusion as to the effectiveness of L-208 as a measure for diverting manpower to essential wartime enterprises."

It would be preposterous to say that the Court of Claims erred in confining its Findings to "hardrock miners" (see above, p. 70-73).

It would be plainly wrong to say that the Court of Claims' Findings were "confined" to the last sentence of Finding 47 that "approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year". Finding 47 (R. 106), Finding 50 (R. 106-107), Finding 51 (R. 107), and the last paragraph of Finding 52 (R. 111), read together, establish the practical failure of the effort to "maneuver our manpower" to the nonferrous metal mines by Order L-208.

The petitioner asserts that the action of the Court of Claims in emphasizing the small number of hardrock miners "who remained in the nonferrous metal mines for a year" was arbitrary. *That was the test used in the report made in May, 1944 by the Policy Analysis and Records Branch of the WPB itself, and concurred in by Dr. Nelson, Mr. Knoizen and Mr. Hayes, all of whom have been identified (R. 111).* It did not accomplish much to have trained gold miners obtain transient employment in the nonferrous metal mines.

The only authority cited in support of the characterization of the Court of Claims as arbitrary is Mr. Samuel Lipkowitz, who testified for the Government at R. 994-995 (p. 67). It is absurd to advance Mr. Lipkowitz's theories as a basis for the assertion that the Court below was arbitrary, as will be evident from his testimony (R. 994-995). Mr. Lipkowitz was the man who, at the October 1, 1942, meeting when the gold mining industry had its hearing, "stated that there were between 10,000 and 12,000 men who were then employed in the gold mines", a truly fantastic example of statistical confusion (see above, p. 78-79).

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The substance of the matter is that the petitioner shrinks from the task of trying to establish that L-208 accomplished its purpose of maneuvering a significant number of hardrock miners to the nonferrous metal mines. What the petitioner seeks to do is to establish something entirely different, viz., that by L-208 many men and women were thrown out of work; that they "did not disappear from the face of the earth"; and that, since a war was on, some of them must have obtained employment in essential enterprises. Although that may be true, it is certainly irrelevant in considering the judgment of the Court below and a very weak defense of L-208.